

## THE CODE OF CRIMINAL PROCEDURE

1. The criminal procedure code is both substantive & procedural in nature.

Law is a popular term. It is very difficult to give a uniform and precise definition of law. Law has been defined differently by different jurists. The Government prescribes a certain uniformity of human action to be followed by the subjects in day to day for the welfare & progress of the people & the society.

That is known as law. The duty of the state is many fold out of which maintenance of peace in the society and administration of justice are important. Function of law is to maintain law and order in the society and that people can live in peace and pursue their respective goals. Without law people can never be able to live in peace and cannot achieve progress. Law is indispensable for human existence.

Law may be classified into different divisions. Such as civil law, criminal law, Constitutional law etc. Law also can be divided into two major categories.

1. Substantive law
2. Adjective law

Adjective law is also known as procedural law. Substantive law defines rights and duties with right, life, liberty and liabilities of individuals, substantive criminal law defines and different offences and provides punishments therefore ,Adjective law on the other hand deals with the procedural aspect of the substantive law. Adjective law prescribes different

procedures to be followed in matter of enforcing the rights provided under the substantive law Indian penal code for example is an example of substantive law where as the criminal procedure code is termed as a piece of procedural law.

The criminal procedure code deals with classification of courts and their constitution power and procedure to be followed by them besides general provision of procedure in holding trials etc. From the arrangement of the criminal procedure code it can be said that it is a piece of procedural law.

The criminal procedure code does not deal with procedure only .It also provides certain matters which are substantive in nature. In other word in the body of the criminal procedure code, the substantive rights of individuals are also dealt with. For example the right of maintenance of certain categories of persons u/s. 125 the right of getting bails u/s.436, 437, 438, 439 the right of possession of immovable property u/s 145 right to remove public nuisances u/s.133 right to appeal under chapter 29 and revision, and rules for disposal of property u/s.451are some of the instance of substantive law.

The functions of procedural law are

1. To provide jurisdiction to courts
2. To set in motion the machinery of justice
3. To provide methods to be adopted for different trials and to provide ways and means for executing the decisions of the court. All these provisions are there in the code of criminal procedure that is why the Criminal

Procedure Code falls within the category of an adjective law since the code deals with substantive law as discussed above , it can also be termed as a piece of substantive law. To harmonize the above discussion it can safely be concluded that the criminal procedure code is not wholly procedural law in nature. It is a mixture of both adjective and substantive law. The major portions of the code contain procedural law but however minor it may be, it contains also some amount of substantive law. The criminal procedure code is a happy combination of both substantive and procedural law.

## **COMPLAINT :**

The criminal law can be set in to motion in several ways, out of which making complaint is one .The term complaint has been defined under section 2 (d) of the code .The ordinary meaning of the term complain is an act of expressing grievance . An exhaustive definition of complaint has , however, been provided in the code.

In order to constitute a complaint there must be the following ingredients.

1. There must be an allegation.
- 2 . That allegation may be made either orally or in writing.
- 3 . The allegation must relate to the commission of any offence as defined under the penal law.
- 4 . That allegation must be made to magistrate.

5 . That allegation must be made against certain persons whether those persons are known or unknown.

6 . The allegation must be made with a view that the magistrate will take legal action provided under the code.

7 . A complaint does not include a police report once FIR has been lodged with the police , the police may investigate into the matter and after investigation of the case ,the police officer is to submit report under section 173 to the magistrate. Such police report disclosing commission of an offence may be divided in to two categories . (a) one relating to the commission of cognizable offences and (b) one relating to non-cognizable offence. The police report disclosing commission of cognizable offence is not included within the definition of complaints, but police report disclosing only commission of non cognizable offence shall be deemed to be a complaint.

A complaint need not contain all details of the prosecution evidence. It is also not necessary that a complaint should be made by an aggrieved person. Any body can make complaint to set the law into motion. No particular form is prescribed in which the complaint is to be made. A complaint need not be presented in person. It is also not necessary that the person making a complaint must have personal knowledge of the facts constituting the offence. The magistrate is empowered to make cognizance of offence under S.190 cr.p.c on complaint. Complaint plays a significant role in initiating criminal case.

### **3 . Inquiry , investigation and Trial :**

The terms like inquiry investigation and trial are frequently used in context of criminal proceedings. These three terms denote 3 different stages of a criminals case. Though the code has defined inquiry and investigation but it does not contain any definition of trial. Trial is the concluding stage of a criminal stage of a criminal proceeding where in the guilt of the accused is inquired into for the purpose of inflicting appropriate punishment. Trial relates to offences and conducted by criminal courts. Trials according to the nature of offenses committed are divided into 4 different categories, such as (1) Trials before courts of sessions (2) Trial of warrant cases by magistrate (3) Trial of summons cases by magistrate and (4) Summary trials, trials are judicial proceedings.

The term inquiry has been defined in the code. The definition of inquiry as given in the code is very simple and it says two things (i) inquiry is different from trial, and (ii) inquiries are conducted either by a magistrate or a court.

Inquiry is a judicial proceeding , inquiry precedes trials. The object of inquiry as observed by the supreme court in V.C Shukla Vs state AIR 1980 SC 962 is to ascertain truth of the facts alleged. The purpose of inquiry is to find out the prima facie truth of the allegation made with a view to determine further action to be taken there on .Inquiry is always conducted by magistrate or by a court. Proceeding under section 202 conducted by a magistrate are inquiry in warrant cases the proceedings before the

magistrate prior to the framing id charge are inquiry as observed by the Supreme court in AIR 1974 SC 94 . Inquiry is not confined to offences only It extends to inquiries which are not offences. For example proceedings under chapter 8 relating of security for keeping peace and for good behaviour(S 107 to 124) and chapter 10 relating to maintenance of public order and tranquillity under section 129 to 148 are inquires within the meaning of section 2.

Investigation has been defined under the code. Form the definition the following ingredients emerge.

1. Investigation is a proceeding
2. It is to be conducted either by a police officer or by any person who is authorised by a magistrate in this behalf.
3. Investigation cannot be conducted by magistrate.
4. The purpose of investigation is collection of evidence.

From the above definition it is seen that investigation is altogether different form both trial and inquiry .The object of investigation may be conducted dither by a police officer or by any person of so authorized by a magistrate, but a court or a magistrate has no legal authority to conduct any investigation.

Investigation is a wide term and it includes many things within its fold. Generally investigation means and includes.

- i. Proceeding to the spot where the offence is alleged to have committed.
- ii. Ascertainment of facts and circumstances.

- iii. Search and arrest of suspected persons.
- iv. Collections of evidence including examination of persons acquainted with the facts of the matter under investigation and recording statements of persons including accused.
- v. Search and places and seizure of incriminating articles.
- vi. Forwarding injured persons for medical examination.
- vii. Forwarding accused persons to a magistrate.
- viii. Sending the dead body for post mortem examination and sending articles for other scientific examination.
- ix. Consideration of evidence collected to form a final opinion on the matter and
- x. Submission of a report to the magistrate under section 173.

The police has a statutory power to investigate in to a cognizable offence. Investigation in a non- cognizable offence commences with the order of a magistrate. An illegality of investigation as observed by the Supreme court (AIR 1968 SC 1292) does not vitiate the jurisdiction of the court for trial unless mis-carriage of justice has been caused thereby. After the completion of investigation the investigating officer is bound to submit a report.

#### Distinction between Inquiry, Investigation and Trial:

Investigation inquiry and trial denote three different stages of a criminal trial. The first stage is investigation, When a police officer either by himself or under an order of a magistrate investigates into a case. Ordinarily after lodging of FIR, investigation proceeds. On completion of

investigation a report is sent to the magistrate recommending either further proceeding in the matter or dropping of the case. When investigating officer reports his opinion that an offence has been committed the second stage commences. The second stage is inquiry.

Ordinarily on receiving of the complaint the magistrate holds inquiry. When police submits final report after investigation a magistrate hold inquiry on protest petition field against the investigation report. The purpose of inquiry is to see whether there is *prima facie* case .The inquiry is always conducted by a magistrate or by court and never by anybody else. If no *prima facie* case is made out the case is dismissed .If there is *prima facie* case the accused is summoned to stand his trial. Once the accused faces his trial the inquiry comes to an end, and trial commences. Trial is the third and final stage of a criminal case. The trial commences when the charge is framed.

From the above discussion it is clear that the above 3 stages of a criminal proceeding are different form each other. Those distinction are shown below on a tabular from.

Inquiry	Trial
<p>1. Inquiry is initial stage of a criminal case out of investigation inquiry and trial inquiry is the second stage.</p> <p>2. Inquiry is conducted either by a magistrate or by a court.</p>	<p>1. Trial is the final stage of a criminal proceeding.</p> <p>2. Trial is always conducted by a court or magistrate who is competent to hold that.</p>

<p>3. inquiry covers the proceeding and continues up to the stage of framing the charge.</p> <p>4. Inquiry may relate to the matter which may be offences or not.</p> <p>5. The purpose of inquiry is to ascertain the <i>prima facie</i> case.</p> <p>6. Inquiry never ends in conviction or acquittal.</p> <p>7. Inquiry is the primary stage of a trial. On the recommendation of inquiry, trial commences.</p>	<p>3. The trial commences with the stage of framing the charge</p> <p>4. Trial always deals with the offence.</p> <p>5. The purpose of trial is to find out guilt of the accused.</p> <p>6. A trial must invariably end either in acquittal or conviction of the accused.</p> <p>7. Where inquiry ends trial commences. Trial is based upon inquiry.</p>
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Inquiry	investigation
<p>1. Inquiry is always conducted by a magistrate or court.</p> <p>2. The purpose of inquiry is to ascertain the <i>prima facie</i>. <i>prima facie</i> truth of the allegation).</p>	<p>1. Investigation is always conducted either by the police officer or by any other person &amp;that person is authorized by a magistrate to do so. Investigation can never be conducted by a magistrate or a court.</p> <p>2. purpose of investigation is to collect evidence for the prosecution of the case.</p> <p>3. Investigation is the first and</p>

<p>3. Inquiry is the second stage of a criminal case.</p>	<p>the preliminary stage of a criminal proceeding.</p>
<p>4. Inquiry commences with the filling of the complaint or petition made to the magistrate or a court.</p>	<p>4. Ordinarily investigation commences with lodging of F.I.R in certain cases petition or complaint may be sent by the magistrate for investigation.</p>
<p>5. Inquiry may relate to commission of an offence or any other matter. Such as to find out actual possession existence of public nuisance or claim for maintenance etc.</p>	<p>5. Investigation always is made with respect to commission of offences.</p>
<p>6. Inquiry may be divided into 2 categories, judicial inquiry.</p>	<p>6. Investigation is always non-judicial.</p>
<p>7. In inquiry if statement of any person is a witness is recorded, the person giving the statement is required to take oath and sign the statement.</p>	<p>7. In investigation the witnesses are not required to put their signatures in the statement and no oath is administered to the witnesses.</p>
<p>8. In inquiry there is no provision of making any search, seizure and arrest.</p>	<p>8. In investigation search seizer and arrest are ordinarily made</p> <p>9. At the end of the investigation the investigating officer is bound to submit his report to the concerned magistrate to take further action in the matter. However that recom-</p>

<p>9. At the end of the inquiry if there is prima facie case magistrate or the court proceeds against the person concerned. Further proceeding in the matter is automatic.</p>	<p>mendation is not binding on the magistrate or the court</p>
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Investigation	Trial
<p>1. Investigation is the preliminary stage of a criminal proceeding. It is the foundation on which the trial proceeds.</p> <p>2. Investigation is always non-judicial. It is an administrative processes.</p> <p>3. Investigation is conducted either by police officer or by any other person if he is authorized by the magistrate to do so.</p> <p>4. Purpose of investigation is to collect evidence.</p> <p>5. Investigation never ends in acquittal or conviction. The investigation officer is required to submit a report</p>	<p>1. Trial is the final stage of a criminal proceeding. There can be no investigation after trial.</p> <p>2. Trial is a judicial proceeding.</p> <p>3. Trial is always conducted either by a magistrate or by a court if they are competent to do so.</p> <p>4. Purpose of trial is to find whether the accused is guilty or not.</p> <p>5. Trial always ends either in acquittal or conviction.</p>

<p>to the magistrate or court recommending further action to be taken against the accused, if any.</p> <p>6. During investigation, search, seizure and arrest are made.</p> <p>7. Investigation is always conducted by persons who are sub-ordinate to the magistrate or court.</p>	<p>6. During trial no such things are made.</p> <p>7. Trial is always conducted by a court or magistrate who are empowered and competent to do so under the law.</p>
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#### **4. Warrant case and Summons case :**

The criminal procedure code has divided criminal cases in to two major categories such as summons case and warrant case. Both the cases have been defined in the code. The definition of summons case is negative one where as definition warrant case is positive in nature. Warrant case means a case relating to an offence which is punishable either with death, imprisonment for life or imprisonment for a term exceeding two years and all other cases are summons cases. From the above definition warrant cases deal with offences of serious nature and less serious nature, and less serious offense are placed under the categories of summons case. However there are some distinctions between the above two categories of cases. Those are shown in the following tabular form.

Summon Case	Warrant Case
1. Summons case deals with less serious	1. Warrant case deals with more serious offences.

<p>offences.</p> <p>2. Offences punishable with death, life imprisonment or imprisonment for more than two years are beyond the scope of summons cases.</p> <p>3. No charge is to be framed in summons case.</p> <p>4. The court may acquit the accused if the complainant is found absent.</p> <p>5. Summons case can be withdrawn with the permission of the magistrate.</p> <p>6. Summons case can be converted into a warrant case.</p> <p>7. Procedure in trial of summons case is slightly different from the trial of warrant cases.</p>	<p>2. Warrant case includes offences punishable with death, imprisonment for more than two years.</p> <p>3. Framing of charge is prerequisite for trial of warrant cases.</p> <p>4. The court can discharge the accused if complainant doesn't appear.</p> <p>5. Warrant case can't be so withdrawn. Some of the charges may be withdrawn with the consent of the court.</p> <p>6. Warrant case can't be converted into a summons case.</p> <p>7. The procedure of trial of warrant cases is also slightly different from summon cases.</p>
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## 5. Powers of Criminal Courts :

There are different criminal courts to try different types of offence and the same has been indicated at the relevant places in the first schedule of the code. The

criminal courts are empowered to inflict punishments. Punishments are of different kinds such as 1) Death 2) Imprisonment for life 3) imprisonment-rigorous or simple 4) Forfeiture of property, and 5) fine. The various sentences which the different courts may impose are provided in the code. The sum and substance of the provision may be summarized below.

Name of the court	Sentences which it may pass
1. High Court	1. Any sentence authorized by law.
2. (a) Sessions judge or (b) additional sessions judge	2. Any sentence authorized by law, but sentence of death if passed shall be subject to confirmation by the High Court
3. Assistant Sessions judge	3. Any sentence authorized by except sentence of death, imprisonment for a term exceeding 10 years.
4. a) Chief Judicial magistrate or b)Chief metropolitan magistrate.	4. Any sentence authorized by law except sentence of death, imprisonment for a term exceeding 7 years.
5. a) Court of magistrate first class, or b)Metropolitan magistrate.	5. Any sentence of imprisonment not exceeding 3 years or of fine not exceeding rupees 10,000 or of both.
6. Court of a magistrate	6. Any sentence of imprisonment not exceeding 1 year or of fine

second class.	not exceeding 5000( five thousand) rupees or of both.
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The above table shows the maximum sentence that can be passed by the respective courts shown above under their substantive power. Sentence is a matter of judicial discretion subject to mandatory statutory maximum punishment prescribed by law . As the Supreme court has observed in Modi Ram Vs State of M.P. AIR 1972 SC 2438 that the object of punishment is to bring home to the guilty party the consciousness that the offence committed by him was against his own interest or also against the interest of the society of which he happens to be a member. The sentences should neither be too severe nor too lenient and the Court has to keep in mind the motive and magnitude of the offence, the circumstances in which it was committed and the age character and antecedent of the offender. The question of sentence is always a difficult and delicate matter for the court. The purpose behind the punishment is based upon many factors including.

1. The protection of the public,
2. The prevention of crime,
3. The reformation of the offender and
4. Corporal sufferings of the convict for the crime committee

The maximum penalty is intended for the worst case. The determination of what should be the proper sentence depend on the facts of each particular case. As the Supreme court has observed in AIR 1980 SC 636 that in

awarding sentence, need for rehabilitation and deterrence is to be kept in mind. The punishment to be proper, fair, effective and purposeful must fit not only to the crime but also the criminal. The Supreme court has observed in AIR 1964SCb 1140 (Indo- China steam navigation company) to the effect that modern criminology doesn't encourage the imposition of severe or savage sentences because the deterrent or punitive aspect of punishment is no longer treated as a valid consideration in the administration of criminal law , but it must be remembered that ordinary offences are committed by person either under the pressure of provoked and unbalanced emotions or as a result of adverse environments and circumstances and so while dealing with those criminals who, in many cases deserve a sympathetic treatment and in a few cases are more sinned against than sinners. Criminal law treats punishment ,more as a reformatory or corrective than as a deterrent or punitive measure. However while imposing sentences on the criminals measures like probation and admonition should not be lost sight of.

#### 6. Imprisonment in default of fine-(Section – 30)

The Section 30 empowers a magistrate to award imprisonment in default of fine. The provision of this section are to be read with the provision of section 65,66 and 67 of I.P.C it may be mentioned here, the imprisonment in default of payment of fine is not a substantive punishment, but is a default punishment imposed for failure to pay the fine.

When offence is punishable with fine only section 67 of IPC provide that the imprisonment in default of

payment of fine shall be simple and the term shall not exceed the following scale.

1. Not exceeding two months when the amount of fine Doesn't exceed rupees 50
2. Not exceeding 4 months when the amount of fine doesn't exceed rupees 100.
3. Not exceeding 6 months in any other case.
4. To this limitation section 30 Cr.PC adds one more that is the default imprisonment can only extend to 1/4 of the term which the magistrate is competent to sentence.

The present section 30 of Cr PC speaks of three Principles and those are-

The imprisonment in default of fine shall not

1. be in excess of the powers of the magistrate under section 29 and
2. When imprisonment has been awarded as part of the substantive sentence exceed 1/4 of the term of imprisonment which the magistrate is competent to inflict, and
3. The imprisonment so awarded under this section may be in addition to substantive sentence of imprisonment for the maximum term awardable by the magistrate under Section 29 Cr P C.

The expression as is authorized by law suggests that the provision of this section 30 shall be read with other provisions of law including that of the section 65,66 and67 IPC. The imprisonment in default of the fine is not a substantive punishment and it is imposed for failure to pay the fine. It is awarded only as a measure to enforce payment of fine. Hence, period of imprisonment in default of fine can't be added to the substantive sentence

imposed by the court to negative the jurisdiction of the magistrate. Another thing to be not lost sight of is that sentence of imprisonment for default in payment of fine shall not be directed to run concurrently with the substantive sentence of imprisonment.

As provided by the Supreme court in Basiruddin Ashraaf Vs State of Bihar AIR 1957 SC 645 a conjoint reading of section 30 of Cr P.C and Section 40 and 67 of IPC makes the position clear that a sentence of imprisonment can be awarded in default of payment of fine even though not specifically provided by a statute.

#### 7. Concurrent and Consecutive Sentences :

Section 218 Cr has provided that for every distinct offence of which any person is accused there shall be a separate charge and every such charge shall be tried separately. But the above provisions have some exceptions .An accused may be tried for several offences in one trial.

Provisions of section 31 shall apply when a person is convicted at one trial of two or more offences and the court sentences him for such offences to the several punishments consisting of imprisonments for specific offences .When in a case an accused is convicted for two or more offences the court is to specify as to how the several sentences of imprisonment are to run, either simultaneously or one after another. Simultaneously means concurrently and one after another means consecutively. In cases where several sentences of imprisonment are to run concurrently ,the lesser term of

imprisonment shall merge in the greater, and the convict will remain in jail for a period which is longer.

For example an accused is found guilty for several offences, numbering 3 . The court passes sentence of imprisonment for the first offence 1 year for second offence 2 years, and for the third offence 3 years and all the sentence are ordered to run concurrently. In such case the convict is to remain in jail for 3 years only, because 3 years imprisonment is the longest.

But if the court says while passing the sentences that the above sentences of imprisonment are to run consecutively in such cases the above three sentences of imprisonment are to be added together, the aggregate of which comes to 6 years. Hence the convict is to remain in jail for 6 years. Because in cases of consecutive sentences all the sentences are to run one after another .

When several sentence are to run consecutively the court is to follow three principle as provided under Section 31 Cr P.C Those 3 principles are :-

1. In no cases shall such person be sentenced to imprisonment for a longer period than 14 years.
2. The aggregate of several punishments of imprisonment shall not exceed twice the amount of punishment which the court is competent to inflict for a single sentence.
3. However for the purpose of preferring appeal the aggregate of the consecutive sentences passed shall deemed to be single sentence.

For example, if an accused is convicted of several offences at one trial, say five years imprisonment for 1st offence ,6 years imprisonment for 2nd offence and 7 years

imprisonment for the 3rd offence and the court directs that the above sentences are to run consecutively. Such order of the court shall be illegal because the aggregate of all these sentence exceeds 14years Secondary if that court is the chief Judicial Magistrate whose substantive power of awarding imprisonment is within 7 years he can't exceed twice the amount if his substantive power as in the instant case the aggregate punishment comes to 18 years, whereas the aggregate punishment ought to have been within 14 years (twice of the amount of punishment which the court is competent to inflict for a single offence).

The provisions of section 31 impose a positive duty on the court who is going to convict an accused at one trial of two or more offences. The court is to clearly specify in its order whether the sentences of imprisonment are to run concurrently or consecutively.

## 8. Law relating to Arrest :-

The term arrest very much popular and frequently used in criminal law. The arrest has not been defined. The literal meaning of the word arrest is to bring to a standstill, to seize to catch or to deprive a person of his free movement. When a person is arrested he is detained by the authority till liberated on bail in criminal cases, physical presence of the person arrested is required. In order to procure his presence arrest is made to bring him before the authority. He is prevented to move freely without the order of the authority.

Section 46 has provided as to how arrest is to be made. According to the provision, person making the arrest shall ask the person to be arrested to submit to the custody either by word or by action . If he doesn't submit

the person making the arrest shall actually touch or confine the body of the person to be arrested. If such person forcibly resists the arrest, or attempts to evade the arrest, all means necessary to effect arrest may be used. In every case hand cuffing or roping is not necessary. While arresting the person effecting arrest is not entitled to use more force than necessary.

Chapter 10 of the criminal procedure code in its 20 Section from 41to 60 deals with arrest .The main provisions as provided in the Cr PC with regard to arrest are :-

1. Person arrested to be informed of the ground of arrest and of right to bail.
2. Person arrested may be physically searched.
3. Person arrested may be medically examined and
4. Person arrested not to be detained for more than 24 hours, in absence of special order form magistrate.

The Supreme court in jogendra kumar Vs state of UP AIR1994 SC 1349 and in D.K Basu Vs state of West Bengal AIR 1997 SC 610 has issued certain guidelines to be followed in matters of arrest in Jogendra Kumar the Supreme Court has said that a person is not liable to arrest merely on the suspicion of complicity in an offence. There must be reasonable justification in the opinion of the officer affecting arrest that such an arrest is necessary and justified. Except in heinous offences an arrest must be avoided. If a police officer issues notice to a person to attend the station house and not to leave station without permission that amounts to arrest. The fact and place of arrest must be intimated to a friend or relative of the

arrested and entry to that effect shall be made in the case diary.

In D.K Basu case supreme court has issued as many as 11 guidelines to be followed in matters of arrest, Such guidelines are :-

1. The name, designation, identification of police personnel carrying out the arrest must be recorded in a register.
2. At the time of arrest the police officer shall prepare a memo which shall be attested at least by one witness who may be either a member of the family of the arrestee or a respectable person of the locality. Such memo shall be countersigned by the arrestee also and shall also contain the time and date of arrest.
3. A person who has been arrested shall be entitled to have one friend or relative informed about the fact and place of his arrest.
4. The time place of arrest and place of detention must be notified by the police through the legal aid organization and the police station of the area concerned telegraphically if the next friend or relative of the arrestee lives outside the district, where the arrest is made.
5. The person arrested must be informed of this right to have someone informed of his arrest.
6. An entry must be made in the diary at the place of detention regarding the arrest of the person and information given to friend.
7. The arrestee on his request should be examined of his injuries. That inspection memo must be signed by the arrestee and the police officer and a copy of it must be given to the arrestee.
8. Arrestee should be subject to medical examination at every 48 hours of his detention by a doctor whose name

- finds place in the panel of registered doctors approved for the purpose.
9. Copies of all documents including memo of arrest etc. Should be sent to the concerned magistrate.
  10. The arrest may be permitted to meet his lawyer during interrogation.
  11. The fact of arrest must be displayed in the police control room of all districts and state headquarters within 12 hours of arrest for general information.

Since power of arrest has been grossly misused by the police in derogation to the fundamental right of liberty of the arrestee, the Apex court had to issue such guidelines. In order to secure the precious right guaranteed by Article 21 of the constitution are not denied to arrestees. Transparency of action and accountability are two possible safe guards which the Apex court insisted upon.

In Judicial officers service association Vs. State of Gujrat AIR 1991 S.C 2176 the Supreme court has also issued certain guidelines to be followed by the police in matter of arrest and detention of judicial officers.

## **9. Who Can Make Arrest :-**

The term police and arrest have become so popular that both the terms are interchangeably used. Where there is arrest the name of the police is used and when the word police is used the term arrest automatically is referred to. The ordinary view of the people is that only police can effect arrest and non else. It is true the Police enjoys some unrestricted power of affecting arrest but at the same time others are also competent to effect arrest.

Any police officer without an order from a magistrate and without a warrant, arrest any person as provided under S.41 of the code.

1. Who has been reasonably suspected of being concerned in any cognizable offence.
2. Who has in his possession without lawful excuse any implement of house breaking.
3. Who has been proclaimed as an offender.
4. Who is found with stolen property.
5. Who obstructs a Police officer while in the execution of his duty.
6. Who is reasonably suspected of being a deserter from armed forces of the Union.
7. Who has been reasonably suspected of having committed an offence outside India and for which he is liable to be apprehended under law relating to extradition.
8. Who being a released convict commits breach of any law.
9. Who is requisition by another police officer to be arrested.
10. Who is required to be arrested under section 109 and 110
11. Who in presence of a police officer committed a non-cognizable offence and refuses to disclose his name and residence.
12. Any private person may arrest or cause to be arrested by person under section 43 the following two situation.
  - i) If such person in his presence commits a non-bailable and cognizable offence or
  - ii) Any proclaimed offend

If private person arrests, immediately he is to make over such arrestee to the nearest police officer and the police officer may re-arrest such person.

13. A magistrate whether executive or judicial can also effect arrest under 44 only under one situation that is if any person commits any offence in the presence of a magistrate within his local jurisdiction such magistrate may himself arrest or order any person to arrest the offender. A person arrested by a magistrate under this provision must be produced before another competent magistrate within 24 hours. He himself can't pass an order of remand under section 167,Cr P.C.

The general impression of the people that, only the police officer can arrest and none else is not correct. Any of the 3 categories of persons discussed above can effect arrest under the situation discussed above. Arrest is an important subject. It plays a significant role in the field of criminal administration.

## **8. Proclaimed Offender :-**

The term proclaimed offender is very often used in the criminal courts but, the term had not been defined. Law relating to proclaimed offender has been dealt with under section 82 to 86 of the code.

Proclaimed offender is an offender against whom allegation have been made to have committed the offence. If such offender against whom warrant of arrest has been issued by the court either has absconded or concealing himself that such warrant of arrest can't be executed, in such situation the court may punish a written proclamation, requiring him to appear at a specified place and at a specified time within a period of 30 day from the

date of publication of such proclamation such proclamation shall be published in ordinary place of residence or village or town of the offender and a copy there of shall be affixed to some conspicuous part of the court house. The court may also if it thinks fit direct a copy of the proclamation to be published in a daily newspaper, circulating in the locality.

Once such proclamation is issued in respect of an offender, such offender comes to be known as a proclaimed offender.

The court while issuing the proclamation the court if satisfied that such offender is about to dispose or remove whole or any part of his property, the court may order the attachment of movable or immovable property of such offender to appear before the court. In spite of such proclamation and attachment if the offender doesn't appear within the time specified, the court may put the attached property to sale. However ,the court has power under section 84 of the code to decide claims and objections if any made to such attachment. Once proclamation has been made, such proclaimed offender may be arrested either by the police or by any private individual. If the proclaimed offender appears or is brought before the court the court may in its discretion release the property from attachment.

## **11. Security for keeping peace and of good behaviour:-**

Maintenance of peace in the society is the paramount duty of law in general and in the criminal law in particular. This fundamental duty has been discharged by the law resorting to :

1. Punitive, and
2. Preventive actions.

The entire Penal law defines various offences and provides suitable punishments. The Indian Penal Code is an example of the punitive measures. The provisions of section 106 to 124 deal with preventive actions under the criminal law and the same are to be followed by criminal courts. This preventive criminal jurisdiction has been shared by both the judicial and executive courts. The judicial courts are to exercise their powers under Section 106 whereas, the provisions under Section 107 to 124 are to be implemented by the executive magistrates, by taking security bonds from the potential peace breakers. It is needless to say that provisions of section 106 and 107 are counterparts of the same legislative policy. Prevention is always desirable as prevention is better than cure. The chapter 8 of the Criminal procedure code deals with preventive justice.

The procedures enumerated under section 106 are exclusively meant for judicial courts. In order to attract to provisions of section 106 the following circumstances must exist :

1. A criminal case must be pending before a judicial court.
2. That judicial case must be (a) A court of session or (b) A court of a magistrate first class or (c) A court of appeal or (d) A court of revision.
3. The point of time at which the court is to exercise its power under section 106 must be when the court is about to pronounce the judgment in the case.
4. The court must find the accused guilty of offence and accordingly convict him.
5. The offence of which the accused is found guilty must be one of the offences enumerated under sub-Section 2 of

section 106 such as (a) member of an unlawful assembly.(b) rioting (c) hiring persons to join unlawful assembly (d) continuing in unlawful assembly even after it has been commanded to disperse,(e) assaulting or obstructing any public servant, in discharge of his duty (f) harbouring person hired for an unlawful assembly (g) being hired to take part in an unlawful assembly or riot. (h) affray,(i) any offence consisting of use of criminal force or mischief or criminal intimidation or likely to cause breach of peace.

6. The court at the time of pronouncing judgment must be of the opinion that it is necessary to take security form such convict for keeping the peace.

If all the above ingredients are present then

7. The court may order him to execute a bond with or without sureties for keeping the peace.

8. The period for which the security bond is to be taken shall not exceed 3 years.

Although an order to execute the above bond before an offence is actually committed has the appearance of an administrative order, it is really judicial in character. Section 106 comes into operation when a person is “convicted” of the above offence .If the conviction is set aside on appeal or other wise , the bond so executed shall become void. The expression keeping the peace or a breach of the peace doesn’t necessarily mean a breach of the public peace. The offence of causing hurt to a person involves a breach of the peace, whether it takes place in a private room or in the open street.

The provision of Section 106 are aimed at persons who are a potential danger to the public by reason

of commission of certain offences, and are intended to secure maintenance of public peace and to allay public apprehension. The court has been given wide discretion which it will not exercise unless satisfied that there is a reasonable apprehension of further breach of peace.

## **10. Proceedings under Section 107 to 110**

The maintenance of peace is the paramount consideration of the criminal law. Certain powers have been given to both judicial as well as executive courts to see that peace is maintained in the society. The powers given under section 106 are meant to be exercised by the judicial courts, whereas powers given under Section 107 to 124 are to be exercised by executive magistrates. Chapter 8 under which these powers are enumerated deals with preventive measures of the criminal courts.

Section 107 Cr P.C deals with security for keeping the peace where there is apprehension of breach of peace .This section is preventive and not punitive in nature.

In order to attract the provision of section 107 the following statutory requirements are necessary.

1. There must be some information given to a magistrate.
2. Such magistrate must be an executive magistrate.
3. That information must specify that certain person is likely either to (a) commit a breach of peace, or (b) disturb the public tranquillity, or (c) to do any wrongful act that may probably occasion a breach of peace or disturb the public tranquillity.
4. The magistrate must be of opinion that there is sufficient ground for proceeding against such person.

5. The magistrate may require such person by a specific order to show cause why he should not be ordered to execute a bond with or without sureties for keeping the peace for such period.

6. Such period of the bond shall in no case exceed one year

7. In order to exercise the power under section 107 the place where the breach of the peace or disturbance is apprehended must be within the local jurisdiction of such magistrate or the person who is likely to commit the above breach of peace or disturb the public tranquillity must be residing within his jurisdiction.

8. The show cause notice to be served on such person must be as requirements of section 111, namely (a) the magistrate shall make an order in writing ,(b) he must set forth the substance of the information received,(c) the amount of bond to be executed must be mentioned (d) the term for which the bond is to be enforced must be mentioned,(e) the number, character and class of sureties (if any) required must find place in the show cause notice.

The passing of this pre-liminary order is obligatory. The show cause notice issued to the delinquent must be accompanied by the order.

After the delinquent appears before the magistrate, the magistrate shall hold inquiry as to the truth of the information and shall take such evidence as may appear necessary. The procedure of inquiry to be followed shall be as nearly as that of summons case, the inquiry under section 116 shall be completed within a period of 6 months from the date of its commencement and if the

inquiry is not completed within 6 months, it shall stand terminated. If the information is found to be true and the magistrate is of the opinion that the delinquent should execute a bond ,the magistrate shall pass the order accordingly. If the person fails to execute bond he shall be detained in prison.

A proceeding under this section may be dropped at any stage when the magistrate is satisfied that there is no danger of any breach of peace.

The executive magistrate may exercise similar powers and follow similar procedure while exercising this power under section 108,109 and 110. The substance is same through facts and circumstances of the case shall differ in the above sections.

## **11. Order for Maintenance :-**

It is the natural moral and fundamental duty of every person to provide maintenance to his wife, Children and parents, when they are unable to maintain themselves. Right to maintenance is a civil right of a dependant. This right has been more suitably and adequately dealt with under the respective personal laws of the person concerned and the same gives rise to civil remedies. However right to maintenance finds a place in this Criminal procedure code, presumably with a view to provide a swift cheap and a stop-gap remedy against a person who despite sufficient means neglects or refuses to maintain his dependants, who are unable to maintain themselves. The provision under section 125 is a measure of social justice, falling within the constitutional sweep of Articles 15 (3) and 39 , guaranteed to protect the weaker section like women, children and aged parents. It

is a secular legal safeguard irrespective of the personal laws of the parties.

The legislative intent behind the section is to compel a man to perform his moral obligations which he owes to society in respect of his wife, children and parents, so that they are not left unsecured beggared for and destitute on the scrap-heap of society and thereby driven to a life of vagrancy, immorality, and crime for their subsistence. The object of this section is to prevent destitution in public ground and vagrancy. As the Supreme Court has put it, the provision of section 125 has a social purpose and sister clauses in their interpretation must receive a compassionate expanse of the sense that the words permit. In this generous jurisdiction a broader perception and appreciation of facts and their bearing must govern the verdict not chopping little logic or tinkering with burden of proof (AIR 1979 SC362 ). The jurisdiction of the magistrate under section 125 is preventive and not remedial and certainly not punitive. Section 125 prescribes a summary procedure and the findings reached under section 125 are not final and the parties can agitate their rights in civil courts ( Nand Lal AIR 1960 SC 882).

1. The claim for maintenance may be made against any person who having sufficient means either neglects or refuses to maintain the claimant. Such claim can only be made before a magistrate first class.
2. Only four categories of persons who are unable to maintain themselves can prefer claims before the court. They are (a) legally married wife ,(b) parents, (c) legitimate or illegitimate minor children, Whether married or not (d) legitimate, illegitimate children who by reason of any physical or mental abnormality or injury

unable to maintain themselves. It may be maintained here that father of a minor female married child is bound to maintain her until she attains her majority, if the husband of such minor female child is not possessed of sufficient means to maintain her.

3. The ceiling of rupees 500 as the maximum amount awardable as maintenance under section 125 has been done away with, by the latest Amendment Act (50 to 2001) ,Which has come in effect from 24.04.2001. Now the court can grant any amount it thinks fit.
4. The court has also been empowered to order for interim maintenance during pendency of the proceeding.
5. Sufficient means doesn't signify only visible means, if one is healthy and able bodied he must be held to have means to provide maintenance. Here means includes a capacity to earn.
6. Neglect or refusal of the opposite part to maintain is the first essential to be proved in order to get maintenance.
7. On default in payment of maintenance if without any justification she declines to live with her husband.
8. Wife shall not be granted with maintenance if without any justification she declines to live with her husband.
9. No wife shall be entitled to get maintenance if she comes under any of the three circumstances.
  - a) If she is living in adultery.
  - b) If without any sufficient reason she refuses to live with her husband or
  - c) If the husband and wife are living separately by mutual consent. If any of the three circumstances is

proved to exist, the order of maintenance, if already made, shall be cancelled.

10. The provisions of Section 125 is secular in nature, it applies to every type of persons irrespective of their religion and even to foreigners living in india.

11. A word is necessary to be mentioned here about the position of law with regard to divorced Muslim wife. In the case of Shah Bano AIR 1985 SC 945, the Supreme Court had held that a divorced Muslim woman is entitled to maintenance under Section 125 Cr P C but subsequent to this decision the Muslim Women (protection of rights on divorce) Act 1986 has been passed, which has practically made section 125 inapplicable to divorced Muslim wives. Such divorced Muslim wife is to claim maintenance under the provisions of the above 1986 Act. A reference may be made to a decided case of the Supreme Court in Daniel Latifi Vs Union of india (2001) 7 S.C.C 740, Where in it is held that the husband is bound to maintain his divorced wife through out her life (even after the period of iddat).

Section 127 and 128 are consequential in nature. The case for maintenance can be initiated before judicial magistrate first class anywhere in the district where parties reside. The order of maintenance can be modified or cancelled on sufficient reasons and the order may be enforced by and executed any magistrate.

#### **14. Maintenance of Public order and tranquillity (Section 129 to 148)**

The maintenance of public order, peace and tranquillity in the society is the first priority of law. Unless there is peace no society can grow and no individual can develop his personality to achieve his goal. Peace and

tranquillity are the most precious things for human beings and their preservation and maintenance are highly essential for any society. Public order peace and tranquillity can be properly maintained if the causes responsible to disturb or destroy them are either removed or nipped at the bud or put under proper check.

In order to achieve the above basic objectives of law, the legislators in their wisdom, have enumerated as many as 4 such potential, dangerous factors which are considered to be major sources of danger for maintenance of peace. Those 4 factors are

- A) Unlawful assembly
- B) Public nuisance
- C) Urgent cases of nuisance and apprehended danger, and
- D) Dispute relating to possession of immovable property.

If the above major 4 factors can be promptly and suitably tackled at their very inception then there will be no major obstacles in the way of maintaining peace. Keeping this legislative objectives in mind adequate provision have been made under chapter 10 of the Cr PC.

#### **A. Unlawful assembly :**

First in kind comes unlawful assembly. If any unlawful assembly is seen, it should be immediately dispersed in the following manner.

1. Any executive magistrate or officer in charge of a police station may command such unlawful assembly likely to cause disturbance of the public peace to disperse.
2. If the assembly does not disperse, the above officers may proceed to disperse such assembly by force and if necessary may arrest the members of such assembly.

3. Despite the above two measures if such assembly can not be dispersed, the executive magistrate may cause the assembly to be dispersed by the armed forces and also arrest the members of such assembly.
4. While dispersing such unlawful assembly officer of the armed forces shall obey the requisition of the executive magistrate and shall use as little force and to do as little injury to person and property as is necessary.
5. There shall be no prosecution against any person for any act purporting to be done under Section 129 to 131 except with the sanction of the Government.

The term unlawful assembly has not been defined in Cr. PC. So the same is to be understood in the sense as provided under Section 141 IPC.

#### B. Public Nuisance :

Public nuisances have always been considered to be potentially dangerous to the maintenance of public order and tranquillity. Public nuisances have not been defined in the Cr. P C. The provisions of sections 268 to 294 -A, IPC, however, relate to public nuisances which are made punishable under the penal code. Here in the Cr. PC procedure has been laid down for speedy removal of certain categories of public nuisances. It may be mentioned here that nuisances may be either private or public. Removal of private nuisance is a matter within the jurisdiction of civil courts, through under certain circumstances civil suits are maintainable for removal of public nuisances. Public nuisance is always considered to

be offensive to the public, and inconvenience, discomfort, annoying or endangering the safety of the public.

Section 133 enumerates 6 types of public nuisances, such as

1. Any unlawful obstruction put in any way, river, channel
2. The conduct of any trade or occupation or keeping of any goods or merchandise injurious to the health or physical comfort of the community.
3. Disposal of any substances likely to occasion conflagration or explosion.
4. Any building tent structure or tree likely to fall and cause injury to persons living or passing nearby.
5. Any tank well or excavation adjacent to any public place without any fence.
6. Any dangerous animal.

Section 133 provided speedy and summary remedy in case of urgency, where danger to public interest or public health and safety is conceded. The purpose is that unless immediate steps are taken irreparable injury will be done to the public and maintenance of public order and tranquillity will be jeopardized. The power under section 133 is to be exercised by Sub-divisional Magistrate, District Magistrate or any other executive magistrate of specially empowered in that behalf. When reliable information reaches the above executive magistrates regarding existence if any public nuisances of above 6 categories, a proceeding is to be initiated with serving a show cause notice on the person concerned

why such public nuisances will not immediately be removed S 133 proceeding is a regular inquiry where evidence is to be taken form both the sides and if existence of such public nuisances is proved the magistrate shall cause the same to be removed immediately. No order made by a magistrate made under Section 133 shall be called in question in any civil court. Any person violating the order of the magistrate by not removing the public nuisances shall ne liable to be punished under Section 188 IPC.

### C. Urgent Cases of nuisance (Section-144)

Provision of Section 144 is meant to deal with urgent cases of nuisances and apprehended danger. Provisions are meant to meet with emergency situations and cases of urgency to keep the matter in status quo. When district magistrate or sub-divisional magistrate or any other executive magistrate specially empowered gets reliable information that immediate prevention or speedy remedy is desirable in certain categories of cases of nuisances or apprehended danger to prevent obstruction, annoyance or injury to any person or danger to human life or disturbance to public tranquillity, the above executive magistrates may resort to section 144 .

Power under section 144 are to be exercised in cases to grave emergency. The preservation of life and property is the first and foremost duty of the Government and to secure this end, power is conferred to interfere with even the ordinary rights of the members of the community. The gist of action under section 144 is the urgency of the situation, its efficacy lies in the likelihood of being able to prevent some harmful occurrences. It is not ordinary power flowing from administration, but a

power to be used in judicial manner. As the Supreme Court has observed that sometimes a person may be prevented from doing something even upon his own property provided the doing of perfectly legal act constitutes a danger to human life, health or safety of others or to public peace and tranquillity (AIR 1978 SC 422) Section 144 is not in conflict with Article 19 of the constitution.

The guiding principles for applying the provisions of section 144 are given below :-

1. It is intended for use only in cases of grave emergency where immediate prevention or speedy remedy is essential in the interest of public.
2. It is to be resorted to only when the magistrate is satisfied that the use of other power would not be effective.
3. The power should be exercised in a fair manner in defense of legal rights rather than in suppressing them, in the repression of illegal acts rather than interference with lawful rights (1981 Cr LJ 1835 SC).
4. This power shall be exercised temporarily to override private rights and restrain individuals from doing perfectly lawful acts, as in conflict between public interest and private rights, the former must prevail.
5. Orders of civil courts should not be interfered with and every Endeavour should be made to respect the rights declared by civil courts.
6. No order under this section shall remain in force for more than two months unless the State Government extends for such further period not exceeding 6monthsform the date of expiry of the order.

The order under section 144 must be a written order containing material facts to show that it was justified and non-compliance where of would vitiate the order. It must clearly state who are prohibited and which acts are prohibited. Order may be passed against individual or public generally. Disobedience of order under section 144 is punishable under section 188 IPC. Successive order of section 144 in respect of the same dispute is illegal.

**D. Dispute concerning Possession of immovable property ( Section -145) :**

maintenance of public order and peace is the paramount consideration of law in general and criminal law in particular. Besides unlawful assembly, public nuisances and urgent cases if nuisance and apprehended danger, the fourth obstacle that comes in the way of maintenance of peace and tranquility is the dispute concerning the possession of immovable property, Which may be land or water or boundaries thereof. This section 145 confers powers on executive magistrates. Such magistrates get jurisdiction to initiate a proceeding under section 145 when a dispute over possession of any immovable property is likely to cause breach of the peace. So the emphasis is on the likelihoods of the breach of peace. Under this section a speedy remedy is provided. The order passed under this section is temporary in nature and the party found in possession is entitled to remain in possession until he is evicted there from, in due course of law and that too on final determination of the dispute by a competent court.

Disputes relating to possession is of 2 types

2. Actual physical possession and
3. Right to possess.

With regard to actual physical possession it may be said that actual physical possession means the possession of the person who has his feet on the land, Who is ploughing it, sowing it or growing crops on it entirely irrespective of whether he is the owner of the land or not .Actual physical possession will vary with the nature of the subject matter but one thing is to be made clear that actual physical possession of a trespasser without any title whatever. The aim and object of the section is maintenance and preservation of the public peace and to maintain obviously the status quo. So the magistrate is to see actually who has the physical possession on the date when the proceeding is initiated right to possess is different fro actual physical possession. Right to possess is connected with ownership of the land. The owner of a land has always right to possess the land . In S.145 proceeding the magistrate need not go into the question of little. The question of title is not relevant in a proceeding under section 145. The Supreme Court in Bhinka Vs Charan Singh AIR 1959 SC 960 has held that in passing an order under section 145 the magistrate does not purport to decided in due course by law. The foundation of his jurisdiction is an apprehension of the breach of the peace, the orders are thus merely police orders and decide no question of title.

But if a party is dispossessed wrongfully from the land in dispute within 2 months before the preliminary order, then the magistrate shall take into

consideration that fact of dispossession while deciding the dispute and shall declare the possession of the party who has been so dispossessed.

The guiding principles for applying the provisions of section 145 are :

1. The power given under section 145 shall be exercised only by an executive magistrate.
2. There must be a dispute concerning possession of immovable property. Dispute means actual disagreement existing between the parties on the question of possession at the time of the initiation of the proceeding.
3. The magistrate gets jurisdiction only if the dispute is likely to cause breach of the peace. Once the likelihood of breach of peace is not there the magistrate loses his jurisdiction and on that count the proceeding is to be dropped.
4. In the S.145 proceeding the question of actual physical possession is to be determined without reference to the question of ownership and to the merits of claim as to right to possess.
5. The only object of this section is to prevent a breach of the peace. So a speedy remedy is provided by a summary proceeding.
6. The magistrate is to promulgate a preliminary order as contemplated under section 145

- (i) If he is satisfied that there exists a dispute of above nature.
7. The duty of the magistrate is only to declare and maintain the possession of the party who is found on inquiry to be in actual possession.
8. There shall be a regular inquiry regarding the dispute by allowing reasonable opportunities to both sides to adduce evidence in support of their respective claims.
9. The provisions of section 145 must be read with that of section 146 .
10. If the magistrate finally comes to the conclusion that a particular party is in possession of the disputed land, he shall declare his possession and forbid the other party to interfere with the possession of the other party.
11. But if the magistrate comes to the conclusion that
- It is a case of emergency, or
  - None of the parties was in possession of the disputed land ,or
  - He is unable to satisfy himself as to which of the parties was then in such possession or the subject of dispute, then the magistrate shall attach the property under section 146 until the right of the parties

are finally determined by the court of competent jurisdiction.

12. Under section 145 the magistrate has no power to pass an interim order to give back possession to any party who claims to have been dispossessed.

The proceeding under section 145 are quasi judicial and quasi administrative in nature. As the Supreme Court has observed in Chandu AIR 1978 SC 333 ,that 145 proceeding is primarily concerned with the prevention of the breach of the peace by declaring the party found in possession to be entitled to remain in possession until evicted there from, in due course of law. A proceeding under section 144 can under certain circumstances be converted into one under section 145. The continuance of proceedings under section 145 for a long time betrays the basic structure of the proceeding under section 145 being based on apprehension of breach of peace are basically preventive and not punitive.

When a dispute exists regarding any right of user of any land or water, whether such right is claimed as an easement or otherwise which is likely to cause breach of the peace, then the executive magistrate may initiate a proceeding under section 147.In all other matters the proceeding under section 147 are same with that's if 145 proceedings. Magistrate exercising power under 145,146 and 147 may hold local inquiry if necessary.

## 15. First Information Report (FIR) :-

There are several modes for initiating Criminal cases. Out of which lodging FIR is one. An information given under section 154 (i) of the code, regarding commission of any cognizable offence to the officer-in-charge of the police station is commonly known as first information report (popularly known as FIR). The term FIR has neither been defined nor used in the code, though it plays an important role in criminal justice system. FIR is a very valuable document with regard to criminal prosecution. As the name suggests, the report contains information about commission of cognizable offence and made in the earliest point of time. It sets the criminal law into motion and marks the commencement of the investigation of the case and ends up with the formation of opinion under section 169 or 170, as the case may be and forwarding of a police report under section 173 Cr PC. There can be no second FIR. All information either made orally or in writing after lodging of FIR and after investigation has commenced, will be statements falling under 161 and 162. FIR is not a substantive piece of evidence and it can only be used in corroborating the statement of the maker under section 157, or to contradict it under section 145 of the Evidence Act.

As the Supreme Court has put it in Surjeer Singh AIR 1962 SC 1389 that, FIR need not be given by an eye witness. Again the Supreme Court in State of Haryana Vs. Choudhury Bhajanjal AIR 1992 SC 604 has observed that when any

information disclosing cognizable offence is laid before the officer-in-charge of a police station, he has no option but to register the case on the basis thereof.

Section 154 provides for prompt and proper record of the information. It enjoins the police officer-in-charge to observe certain duties and formalities for recording of FIR. The conditions which are sine queue non for recording a first information report are :

1. There must be some information.
2. That information must relate to commission of any cognizable offence.
3. The information may be given either orally or in writing.
4. Such information must be first (earliest) in point of time.
5. The information must be given to the officer- in-charge of a police station.
6. The information so given must be reduced to Writing by such police officer, and entered in a book kept in the police station.
7. The information so reduced to writing must be read over to the informant.
8. The informant then shall be asked to sign the same.

9. A copy of the information as recorded shall be given forthwith, free of cost, to the informant.

10. If the officer-in-charge refuses to record FIR, the aggrieved person may send the substance of such information (a) in writing, (b) by post, (c) to the Superintendent of Police concerned. If the Superintendent of police is satisfied that such information discloses commission of cognizable offence, he may himself investigate the case or direct an investigation to be made by any police officer.

First information of the commission of a cognizable offence is enough to constitute a FIR. Mention of time of commission or in what circumstance it was committed or who committed the offence is not essential. These matters may be ascertained during the investigation. The commencement of investigation after FIR is lodged in subject to two conditions. Firstly the police officer should have reason to suspect the commission of a cognizable offence as required by section 157(i). Secondly the police officer should subjectively satisfy himself as whether there is sufficient ground on entering on an investigation even before he starts an investigation into the facts and circumstances of the case as contemplated by section 157 (1-b). A counter information given by the other party after information has been lodged by one party comes under section 154 and is not hit

by section 162. Information given through telephone can't be regarded as FIR (1995 Cr LJ 2744). Mere delay in lodging FIR is not fatal. Any such delay should be reasonably explained. As the Supreme Court has observed FIR is not a piece of substantive evidence and can be used only for contradiction or corroboration. (AIR 1973 SC 476).

## **16. Section 162 and its Legal Significance :**

The investigation officer has been authorized under Section 160 and 161 to examine persons who are acquainted with the matter under investigation and to record their statements. If such statements of witness are recorded then such statements are subject to certain statutory restrictions as imposed under S 162. The provision of section 162 are in fact continuation of section 161. Provisions of section 162 lay down specifically the mode in and the purpose for which the statement may be used in evidence. The object behind section 162 is to protect the accused both against overzealous police officers and untruthful witness, because statements recorded under section 161 were made under circumstances not inspiring confidence.

The provisions of section 162 are legally significant for following provisions.

1. It is not obligatory for the investigating officer to record statement of witness examined under section 161
2. If such statements reduced to writing, it shall not be signed by the maker of the statement.
3. Both the statements made orally and any record thereof shall not be used for any purpose except at any inquiry or trial in respect of any offence under investigation.
4. Such statement shall be used either by the accused or with the permission of the court by the prosecution. If person making the statement is examined as a prosecution witness.
5. Such statement shall be used only for the purpose of contradiction that witness under section 145 of the Indian Evidence Act. (Such statement cannot be used for corroboration of prosecution or defence witnesses or for contradiction of defence witnesses).
6. The provisions of section 27 and 32(i) of Indian Evidence act are not affected by the provisions of section 162. Section 32(i) speaks of dying declaration (statement as to the cause of his death) and section 27 deals with information leading to discovery. Statement of deceased to the police as to the cause of the cause of his death and statements leading to discovery, made by the accused to the police are admissible and section 162 shall not affect their admissibility.

Section 162 imposes a complete ban on the use of statements recorded by the police

officer under section 161 for the purpose of corroboration or as substantive evidence.

### **17. Recording of confession and statement by magistrate under section-164 :**

Section 164 Cr PC. Empowers certain magistrates to record confession made by accused and statement made by witnesses. Only two categories of magistrates are empowered to record such matters and they are 1. Metropolitan Magistrate . Or 2. Judicial Magistrate whether they jurisdiction in the case or not .Such magistrate may exercise the power under section 164 during the following period such as (i) in the course of investigation or (ii) at any time after the investigation before the commencement of inquiry or trial.

No police officer on whom an, power of a magistrate has been conferred shall record confession under section 164.

Section 164 imposes statutory obligation on the magistrate before recording confession under 164 is a solemn act and in discharging his duties under this section the magistrate must take care to see that the requirements of law must be fully satisfied. The provisions of section 164 is a safety valve against involuntary confession. At the time of recording confession under section 164 the magistrate is to comply with four mandatory statutory requirements. Those are :

1. The magistrate must warn the accused by explaining to him the gravity of confession.
2. The magistrate must explain to the accused that he is not bound to make a confession.
3. The magistrate shall also explain to him that if he makes confession such confession may be used as evidence against him.
4. The magistrates shall question the accused and shall not record any such confession unless he has reason to believe that the confession is being made voluntarily.
5. Recording of the confession of an accused person immediately on his production by the police should be avoided. Ordinarily he should be allowed a few hours for reflection, so that he shall be free from the influence of the police before his statement is recorded.

Non-compliance of the above mandatory provisions of this section renders it inadmissible in evidence ( Kenar Singh Vs State AIR 1989 SC 683 ). It is the duty of the magistrate to exclude the presence of the police officer from the place when confession is recorded. The confession shall be recorded in the manner provided in section 281 for recording examination of an accused and confession so recorded shall be signed by the person making it and the magistrate shall make a memorandum at the foot of such record to the following effect.

I have explained to the accused that he is not bound to make a confession , and that if he does so, any confession he may make may be used as evidence against him, and i believe that this confession was voluntarily made. It was taken in my presence and hearing and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

The magistrate shall sign this memorandum.

Sub-section 5 of section 164 provides the mode of recording statement of witness after administering oath to the person. Statement of each and every person can not be recorded under section 164 . The Supreme Court in Jogendra Nahak Vs State of Orissa 1999(17) O.C.R (SC) 342 has held that unless the person is sponsored by the investigating officer, his statement shall not be recorded by the magistrate under section 164.

Whether it is confession or statement, if recorded under section 164, such statements can never be used as substantive evidence of truth of the facts stated but the same may be used for contradiction or corroboration of the witness, who made it. Confession or statement recorded by a magistrate who is not empowered under section 164 Cr PC is inadmissible in evidence . Such a basic

defect cannot be cured by section 463. Confession or statement so recorded under section 164 should not be made over to the police but sent directly to the magistrate who is to inquire or try the case.

### **18. Jurisdiction of criminal Courts :**

Jurisdiction means authority of the court to entertain and try cases. So jurisdiction plays a significant role in any litigation whether it is civil or criminal. The first thing that is to be seen in a cases is jurisdiction of the court. The Supreme Court is of the view that the proceedings taken in a wrong court or at a wrong place would not vitiate the trial unless it occasions the failure of justice (Mangal Das Vs State of Maharashtra AIR 1966 SC 128). In the matter of jurisdiction the Criminal Procedure Code has adopted the common law principle of England that all crimes are local and justiciable by local courts within whose jurisdiction they are committed. However the Code has also added certain exceptions to the above common law principle.

The competency of a court to take cognizance of an offence and its inquiry and trial are determined by the place in which the offence is alleged to have been committed. The crimes in their nature local and jurisdiction of criminal courts is also local. But this law few exceptions

which have been enumerated under different sections of the code , such as :

1. a) When it is uncertain in which of several local areas an offence is committed ,or
- b) Where an offence is committed partly in one local area and partly in another, or
- c) Where an offence is a continuing one, and continues to be committed in more local areas than , or
- d) Where an offence consists of several acts, done in different local areas.

Such offence may be inquired into or tried by any court having jurisdiction over any such local areas.

2. Where an offence is committed at one place and consequence of which has ensued in another area that offence is committed or consequence has ensued.
3. In case of dacoity such offence may be inquired into or tried by a court in whose local jurisdiction such offence was committed or the accused was found.
4. Offence of kidnapping and abduction may be inquired into or tried by a court within whose local jurisdiction the person was kidnapped or abducted or was conveyed or cancelled.

## **19. TO Take Cognizance of offence (Section-190)**

The provisions of Section 190 provides the conditions requisite for taking cognizance of any offence, but the expression to take cognizance has not been defined. Taking cognizance means judicial application of mind by the magistrate to the facts mentioned in the complaint for taking further action. Cognizance can be said to have been taken when the magistrate applies his mind for proceeding under Section 200 (AIR 1976 SC1672). Whether cognizance has been taken by the magistrate or not is a question of fact to be determined in each case.

Section 190 provides that magistrate first class or magistrate second class, if specially empowered in this behalf may take cognizance of any offence in 4 ways. Those are :-

1. Upon a complaint or
2. Upon a Police report or
3. Upon any information received from any person ,or
4. Upon his own knowledge regarding commission of an offence.

Literally taking cognizance means to take notice of an allegation of commission of offence with a view to taking some kind of action provided in the code to bring the offender to justice. The Supreme Court has held that when a magistrate on receiving a complaint applies his mind for proceeding under section 200 to 203 he is said to have taken cognizance of the offence within the meaning of section 190(1)(a). If the magistrate takes action of some other kind such as issuing a search warrant, or ordering investigation by the police under section 153(3), he cannot be said to have taken cognizance of any offence (D. Laxminarayan Vs. Narayan AIR 1976 SC 1672).

From the above observation of the Supreme Court when magistrate judicially applies his mind to the facts of the case for the purpose of issuing summons against the accused persons, or dismissing the complaint the magistrate is said to have taken cognizance of offence.

The Magistrate can before taking cognizance of an offence ask for investigation or he can issue warrant for production but if after taking cognizance, the magistrate wants any investigation, then he should proceed under Section 200. He should before taking cognizance examine the facts of the complaint and determine

whether his power is barred by under any other provisions, such as Section 195(1).

Ordinarily cognizance taking power has not been extended to the court of Session, because court of Session is not considered as a Court of original jurisdiction, but a Court of Session can take cognizance of one offence, That is defamation committed against the president or Vice-president of India Governor of a State or Minister of union or State, Or any other public servant in respect of his conduct in the discharge of his public functions, but such complaint must be made in writing by the public prosecutor within 6 months from the alleged offence with previous sanction of the State Government.

Power of taking cognizance as provided under section 190 is subject to certain statutory restriction. Such restrictions are -

No court shall take cognizance of any offence or its, abetment or attempt or any criminal conspiracy.

1. If the offence is punishable under Section 172 to 188 (Contempt of lawful authority of public servant) except on complaint in writing of the public servant concerned or his superior officer).
2. Offence of giving false evidence or committing forgery in a court proceeding,

the complaint must come in writing from that court or from a court to which it is subordinate.

3. Without previous sanction of the Government or without consent of the Government or the District Magistrate in respect of any offence committed against the state under Section 153-A, 295-A, 505, 153-B, or 120-B.

4. If the accused is or was a judge, magistrate or public servant not removable from his office or any member of armed forces acting in his official capacity without previous sanction of the Government

5. If the offence committed against a marriage punishable under Chapter 20 IPC (Section 493 to 498), unless the complaint is made either by the person aggrieved, or by some other person with leave of the court.

6. If the offence punishable under Section 497 ,498, unless a complaint is filed by the husband.

Power of taking cognizance of the above courts is always subject to the above statutory restrictions.

## **20. Sanction :**

Sections 196,197 and 199 refer to previous sanction “No court shall take

cognizance of any offence, if previous sanction is pre-requisite for it.

Sanction means permission, to prosecute a particular public servant. The sanction is to be given by the appropriate Government. So a sanction is an order directing the prosecution of a certain person and in the ordinary way that order is conveyed to the authorities who are responsible for initiating prosecution in question.

For reasons of public policy, the power of granting sanction has been reserved to the Government to determine whether offences committed by public servants while discharging their official duties should be taken cognizance of. Cognizance can be taken if sanction is issued by the Government. The object is to prevent unauthorized persons from preferring false, vexatious and un-authorized complains against public servants. There is an absolute bar against taking cognizance without sanction. When sanction is pre-requisite for taking cognizance of an offence, that provision is imperative and must be strictly complied with.

A sanction order to be valid must show on it, that the sanctioning authority accorded the sanction after applying his mind to the materials appearing against the accused. Sanction should be expressed with sufficient particularity and strict adherence to the language of this Section.

Sanction constitutes a condition precedent to prosecute certain public servants and confers jurisdiction on the court. Sanction given after filing of prosecution does not validate proceedings. The Government may before according sanction hold a preliminary investigation into the matter as per Section 196 (3). AS the Supreme Court has observed that to necessitate sanction there must be a reasonable connection between the act and the discharge of official duty the act must bear such relation to the duty that, he could lay a reasonable but not a pretended or fanciful claim, that he did it in the course of the performance of his duty. It does not matter if the acts were strictly necessary for the discharge of his duty .What has to be found out is whether the act and the official duty were so interrelated that one could postulate reasonably that it was done by the accused in the performance of official duty, though possibly in excess of the needs and requirement of the situation. (Prabhakar AIR 1990 SC 686 and AIR 1956 SC 44) Sanction is a protection intended for public servants. In matter of sanction whether it is required or not, it is the quality of the act that is important and if it falls within the scope and range of his official duties protection of sanction shall be attracted. (S.B Saha AIR 1979 SC 1841).

The guiding principles with regard to necessity of sanction as deducible from authoritative decisions are -

- 1) The question of sanction arises only in the case of public servants removable by the government.
- 2) When a public servant charged with an offence. Whether sanction or is not necessary must be determined with reference to the allegation in the complaint, not the defence that may be put forward.
- 3) A public servant can only be said to act or to purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty.
- 4) A good test will be whether the public servant if challenged can reasonably claim that what he does, he does in virtue of his office.
- 5) An offence arising out of the abuse of official position by an act not purporting to be official, doesn't require sanction. The act of cheating , acceptance of bribe or abetment thereof doesn't require sanction.

A public servant is protected under the umbrella of sanction not only during his service but also after his retirement or removal from office. If the offence is committed while in service, sanction is

necessary. Cognizance without sanction is illegal. No particular form of sanction is prescribed. Sanction must be definite and sanction order should disclose that the authority considered the relevant material before granting sanction.

Sanction is an executive act. It is the discretion of the Government whether it is to grant sanction or not.

## **21. Petty Offences:-**

The court are created to decide cases and to give justice to the people and that too promptly. But there is a constant problem in India.

In comparison with number of courts, the number of cases are many, as a result of which a large number of cases are pending for disposal, and such disposal of cases takes naturally a long time. It is said that justice delayed justice denied. Besides that unnecessary protraction of cases causes inevitable inconvenience to the litigant public. So court, Government and people all face this problem. With a view to minimize the work load of cases and to avoid unnecessary inconvenience to the litigant public. And to foster quick disposal of cases, section 206 had been introduced in the code. The significance of Section 206 is twofold.

- 1) It defines petty offences and

- 2) It permits the accused to plead guilty in absentia in case of petty offences.

The legislative intent is that cases involving petty offences can be disposed of finally if the accused exercises his option by pleading guilty to the charge in petty offence. This provision in effect saves the valuable time of a court and protects the accused from litigation oriented harassment.

Under the provisions of section 206 magistrate taking cognizance of petty offences which may be summarily disposed of under section 260 shall issue summons to the accused, requiring him to the following things.

(a) Either to appear in person or (b) to appear, or (c) To play guilty by post, or (d) Transmit his plea of guilt by messenger to the magistrate along with the amount of fine specified in the summon which shall be imposed on him. Such amount of fine shall not exceed 1000 rupees.(One Thousand rupees) only.

This procedure is only to be adopted in matter of petty offences. Petty offence has been defined in the section. According to the definition petty offence means any offence punishable with fine not exceeding 1000 rupees. However, the definition is not complete. The State Government may by

notification empower any magistrate to exercise the powers under Section 206 in relation to :

(a) any offence which is compoundable under Section 320, or (b) any offence punishable with imprisonment for a term not exceeding 3 months or with fine or with both ,but the magistrate must be of the opinion that having regard to facts and circumstances of the case, the imposition of fine only would meet the ends of justice.

The whole idea behind the provisions of section 206 is to foster quick disposal of cases which are numerous in number but petty in nature.

## **22. Charge and its contents :**

The necessity of system of written accusation specify a definite criminal offence is the essence of criminal justice system. In order to convict a person of any offence, all the material facts which constitute it must be stated in the charge and satisfied on evidence. A charge is a written notice of the precise and specific accusation against the accused which he is required to meet. Charge is the first notice to the accused about the accusation and so it must convey to him with sufficient clarity and certainty that the prosecution intends to prove against him and of which he would have to clear himself. The object behind

charge is to warn the accused the about case he is to answer. Charge enables the accused to know the case he will have to meet and to be ready before evidence is given.

Section 211 to 224 deal with charge. The sum and substance of the law relating to charge may be given below.

1. Charge must be written and must contain with clarity and certainty the offence with which the accused is charged. That means name of the offence, the law and Section of the offence, particulars as to the time and place of the offence, manner of committing such offence must clearly mentioned in the charge. The fact of previous conviction if any has also to be mentioned in it.
2. For every distinct offence a) there shall be a separate charge, and b) every such charge shall be tried separately.

With regard to the point no 2(b) there are certain exceptions. That means separate trials may not be held for each distinct and separate charge in the following cases. Such exceptional cases are -

- i. If the accused in writing submits to the court to be tried together for all or any number of charges framed against him and the magistrate is of the opinion that the accused

is no likely to be prejudiced by such joint trial, there shall be one trial.

- ii. When a person is accused of more offences than one of the same kind committed within the space of 12 months he may be tried at one trial for any number of offences not exceeding 3. It may be mentioned here that offences of same kind means offences punishable with same amount of punishment coming under the same Section of the penal law including the attempt to commit it.
- iii. If in one series of acts so connected together as to form th same transaction, more offences than one are committed by the same person, he may be charged with or tried at one trial. For example where the accused committed 5 murder in one house and a fourth a little later in a different house he could be charged and tried at one trial because such successive murder did not constitute distinct offences.
- iv. If the acts alleged to constitute an offence faling within two or more separate definitions of any penal law the person may be charged and tried at one trial. For example, separate charges of kidnapping and abduction or charge under section 317 exposure of child likely to cause his death and 304 culpable homicide may be charged separately, but tried at one trial.

- v. If several acts of which one or more than one would by itself or themselves constitute an offence constitute when combined different offences. For example the acts of setting fire to different offices of the Government and looting were a series of incidents to make the continuing offence of waging war may be tried at one trial.
- vi. Where it is doubtful as to what offence has been committed, the accused may be charged with for theft and receiving stolen property alternatively and may tried at one trial.

Different persons may be charged and tried at one trial such persons are (a) persons committing same offence in course of same transaction, b) persons accused of offence and accused of abetment of or attempt to commit , (c) persons committing offences of same kind whthin a period of 12 months, d) Persons committing different offences in the course of same transaction, e) Persons accused of committing offences like theft, extortion, cheating or criminal misappropriation and persons receiving, retaining, concealing or assisting in disposal of the above property and persons committing abetment or attempt, (f) Persons accused of committing offences under Section 411,414 relating to stolen property and its transfer and (g) All persons committing offences punishable under chapter XII,IPC

relating to counterfeit coin including its abetment and attempt.

Law relating to charge as discussed above includes 2 things those are joinder of charges in one trial, and joinder of persons charged jointly in one trial. The joint trial is held for the convenience of both the prosecution and the defence. If such joint trial is prejudicial to the accused the same is to be avoided. Charge once framed can be altered at any time. Any error in stating the offence or particulars of the offence or any omission is not fatal to the case unless the accused is prejudiced and it has occasioned a failure of justice. Accused charged with graver offence may be convicted of the minor offence or attempt to commit although he is not charged with it provided the minor offence is a cognate offence, of the graver offence.

**The principles governing jurisdiction of criminal courts may be explained in a tabular form :**

Offence committed	Tribal by the court within whose local Jurisdiction
1. Dacoity	1. The offence committed or the accused is found
2. Kidnapping or abduction.	2. Person kidnapped or adduced or conveyed or concealed or detained.
3. Theft, extortion or robbery.	3. Offence committed or stolen property was possessed or received or

	retained.
4. Criminal misappropriation or criminal breach of trust	4. Offence committed or any part the property was received, retained or required to be returned or accounted for. 5. Offence committed or was possessed by any person. 6. letters or messages sent or received or the property was delivered or was received. 7. Offence committed or offender last resided with his or her spouse by the first marriage. 8. Through or into whose local jurisdiction that person or thing passed.
7. Offences of bigamy under section 494,495 .	
8. Offence committed in course of journey or voyage.	9. Any offence is committed. 10. Where the accused may be found.
9. Offences charged under section 219,220,221,or 223.	11. Offence committed or consequence of which ensued.
10. Offence committed partly in one local area partly in another.	12. Partly committed.
11. Any other offence.	13. Place of commission. 14. Any of the acts done.

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| 12. Offence committed partly in one local area partly in another.<br>13. Continuing offences.<br>14. Offence consisting of several acts. |  |
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### **23. Trials :-**

Trials is the final stage of a criminal proceeding. There are 4 types of trials. such as :

1. Trial before a court of session ;
2. Trial of warrant cases by magistrate ;
3. Trial of summons cases by magistrate and
4. Summary trial.

Offences exclusively triable by court of Session shall be tried before a court of session. Court of session means and includes 3 types of courts, such as -

Courts of Session may be presided by

- i. A Sessions Judge.
- ii. Additional Sessions Judge.
- iii. Assistance Sessions Judge.

A trial before a court of session is to pass through different stages. Procedure to be followed in such trials are enumerted below one after another.

1. Every Sessions trial shall be conducted by a public prosecutor.
2. After the appearance of the accused in pursuance of a commitment of the case, the public prosecutor shall open his case by describing the charge and by stating the proposed evidence.
3. For the purpose of framing of charge, the session judge shall consider the record and hear the submissions of the accused and the prosecution. If there is not sufficient ground for proceeding against the accused the judge shall discharge the accused with reasons.
4. If there is ground for presuming that the accused has committed an offence, exclusively triable by the court of Session he shall frame charge accordingly, but if the offence to be charged is not exclusively triable by the court of session, the judge may frame charge and transfer the case for trial to the Chief Judicial Magistrate.
5. Charge so framed shall be read over and explained to the accused and the accused shall be asked whether he pleads guilty, of the offence, or claims to be tried.
6. If the accused pleads guilty, the judge shall record the plea and may convict him there on.

7. If the accused refuses to plead or does not plead or claims to be tried or is not convicted on his plea of guilt, the judge shall fix a date for examination of prosecution witnesses, and prosecution witnesses shall be summoned.
8. On the date so fixed the judge shall proceed de die in diem to take all such evidence as may be produced by the prosecution and such witnesses shall be cross, examined by the defence.
9. After the completion of the evidence of the prosecution witnesses, the judge shall examine the accused personally to enable him to explain any circumstances appearing in the evidence against him.
10. The judge shall hear both sides and if he considers that there is no evidence that the accused committed the offence he shall acquit the accused.
11. If the accused is not acquitted the judge shall call upon the accused to enter upon his defence and to adduce defence evidence in support of his case, the court shall issue processes to such witnesses.
12. On the date so fixed the judge shall record the evidence of witnesses for the defence.

13. There after the public prosecutor will first sum up his case and then the lawyer for accused shall give his reply.

14. The judge shall deliver the judgment in the case either acquitting the accused or convicting him.

15. If the accused is convicted two courses are open to the judge. The judge may release the accused on probation under section 360 Cr P.C or the judge shall hear the accused on the question of sentence.

16. If there is charge of previous conviction against the accused and the accused does not admit such previous conviction, the judge shall take evidence in proof of such previous conviction and shall pass the sentence on the accused accordingly.

17. If it a case cognizance of which has been taken under section 199(2) Cr PC the judge shall try the case by following the procedure for trial of warrant cases.

The remarkable features of a Sessions trial are -

i) The prosecution of the case is to be conducted by the public prosecutor.

ii) The prosecution and defence get 3 chances to advance argument in the case, such as one at the time of

- (i) framing of the charge
  - (ii) examination of defence witnesses, and
  - (iii) examination of the accused.
- iii) The sessions trial broadly passes through 3 stages of hearing, first stage upto framing of the charge. Second stage taking evidence of the prosecution and examination of the accused, and third and last stage is taking defence evidence and hearing the accused on question.

## **24. Trial of warrant Cases :-**

Criminal cases are divided into two broad categories, Such as 1. Summons case and 2. warrant case.

Warrant case means a case relating to an offence punishable with either i) death, ii) imprisonment for life, or iii) imprisonment for a term exceeding 2 years. All other cases fall within the category of summons case, Warrant cases are divided into two groups. Such as (i) A warrant case instituted on a police report and ii) Warrant case instituted otherwise than on a police report.

Separate procedures have been provided for trial of the above two kinds of warrant cases.

A. Trial of warrant cases instituted on police report (Sections 238 to 243 & 248) .

1. At commencement of trial the magistrate shall satisfy himself that copies of documents referred to under section 207 have already been delivered to the accused. If not he should cause them to be furnished to the accused.
2. The magistrate shall consider the charge against the accused. If the charge is groundless, the magistrate shall discharge the accused. If there is ground for presuming the accused to have committed the offence and the magistrate is competent to try the offence and punish adequately, then he shall frame charge against the accused in writing.
3. The charge so framed shall be read over and explained to the accused and shall be asked whether he pleads guilty, if the accused pleads guilty to the charge the magistrate may convict him.
4. If the accused does not plead guilty or refuse to plead or claims to be tried or the magistrate does not convict the accused on his plea of guilt, the magistrate shall fix a date for examination of the prosecution witnesses and witnesses shall be summoned.
5. On the date so fixed the magistrate shall proceed to record evidence of

prosecution witnesses followed by their cross examination.

6. After the closure of prosecution evidence the magistrate shall examine the accused, personally to enable him to explain the circumstances appearing in evidence against him and the accused shall be called upon to enter upon his defence, and to produce evidence in support of his defence. The witnesses for the defence shall be summoned.

7. After completion of the defence evidence if any the magistrate if finds the accused not guilty, he shall record an order of acquittal.

8. If the magistrate finds the accused guilty and convicts him accordingly then, 3 courses are open for him, such as :

- i. The magistrate may proceed under Section 325 (when magistrate is of opinion that the accused ought to receive severe punishment but he cannot pass such sentence, or if the magistrate is of the second class and he has no power to ask the accused to execute a bond under section 106 the magistrate shall forward the accused to the Chief Judicial Magistrate for necessary action) or

- ii. The magistrate may release, the accused on probation under Section 360 ,or
  - iii. The magistrate may impose sentence of punishment on the accused. If the magistrate does not proceed either under Section 325 or 360, he shall hear the accused on the question of sentence.
9. If there is charge of previous conviction against the accused, and the accused does not admit such previous conviction, then the magistrate shall take evidence in proof of such previous conviction, then the magistrate shall take evidence in proof of such previous conviction and shall punish the accused accordingly.
10. If the accused is sentenced to imprisonment a copy of the judgment shall be given immediately to the accused free of cost as per Section 363.

B. Trial of Warrant cases instituted otherwise than on police report (Section 244-249)

- 1) After the accused appears or is brought before a magistrate, the magistrate shall proceed to hear the prosecution and to take all such evidence as may be produced by the prosecution followed by cross-examination, if any. Such witnesses may be summoned by the court.

- 2) The magistrate shall consider the above evidence of the prosecution and if he is of the opinion that no case against the accused has been made out the magistrate shall discharge the accused.
- 3) If the magistrate is of the opinion that there is gourd for presuming that the accused has committed an offence and he is competent to try the offence and to punish the accused adequately the magistrate shall frame charge against the accused.
- 4) The charge so framed shall be read over and explained to the accused and the accused shall be asked whether he pleads guilty to the charge.
- 5) If the accused pleads guilty the magistrate shall record the plea and may convict him thereon.
- 6) If the accused refuses to plead or does not plead or claims to be tried or if the accused is not convicted upon his plea of guilt, a date shall be fixed for cross-examination of the witnesses already examined before framing of the charge. After cross-examination of the previous witnesses, the evidence of remaining witnesses for the prosecution shall be taken.

- 7) The accused shall be examined personally to enable him to explain the circumstances appearing in evidence against him.
- 8) The accused shall be called upon to enter upon his defence. To produce defence evidence if any such witnesses may be summoned.
- 9) After considering the evidence and hearing the argument of both sides, if the magistrate finds the accused not guilty he shall record an order of acquittal.
- 10) If the magistrate finds the accused guilty and convicts him 3 courses are open to the Magistrate, Such as-
  - i) The magistrate may proceed under section 325 (when magistrate is of opinion that the accused ought to receive severe punishment but he cannot pass such sentence, or if the magistrate is of the second class, and he no power to ask the accused to execute a bond under section 106, the magistrate shall forward the accused to the Chief Judicial Magistrate for necessary action )or,
  - ii) The magistrate may release the accused  
on probation under Section 360,  
or
  - iii) The magistrate may impose sentence of punishment on the accused. If

the magistrate does not proceed under Sections 325 or 360, he shall hear the accused on the question of sentence.

11) If there is charge of previous conviction against the accused and the accused does not admit such previous conviction then the magistrate shall take evidence in proof of such previous conviction and shall punish the accused accordingly.

12) If the accused is sentenced to imprisonment, a copy of the judgment shall be given immediately to the accused free of cost as per section 363.

13) On any date of hearing if the complainant is absent and the offence is non-cognizable or may be lawfully compounded the magistrate may discharge the accused before framing of the charge.

14) The magistrate has power to order compensation, if the magistrate is of the opinion that there is no reasonable ground for making the accusation against the accused, but no such order for compensation shall be passed without serving show cause notice on the complainant.

## **25. Trial of Summons cases :-**

1. In trial of summons case it shall not be necessary to frame a formal charge. Only

the particulars of the offence of which he is accused shall be stated to him by the magistrate and the accused shall be asked whether he pleads guilty or has any defence to make.

2. If the accused pleads guilty the magistrate shall record the plea and the magistrate may convict him thereon.
3. If it is a case coming under Section 206 Cr PC regarding petty cases and the accused desires to plead guilty to the charge, the accused shall transmit to the magistrate either by post or by messenger a letter containing his plea and also the amount of fine specified in the summons. Even the pleader authorised by the accused may plead guilty on behalf of the accused. In such case the magistrate may convict the accused and sentence him to pay fine.
4. If the accused is not convicted as stated above the magistrate shall
  - (a) hear the prosecution, (b) take all such evidence as may be produced by the prosecution,(c) hear accused and (d) take all such evidence produced by the defence. Magistrate may issue summons to the witnesses.
5. After taking all such evidence if the magistrate finds the accused not guilty, he shall record an order of acquittal.

6. If the magistrate finds the accused guilty 3 courses are open to the magistrate.

i) he may proceed under section 325 (when magistrate cannot pass sentence sufficiently sever, he may suit the proceeding to the chief judicial magistrate).

ii) he may proceed under section 360 by releasing the convict on probation or

iii) he may pass sentence upon him.

7. If the complaint does not appear in the case the magistrate shall acquit the accused. If the complaint is represented by a pleader and magistrate is of the opinion that the personal attendance of the complainant is not necessary, the magistrate may not acquit the accused.

8. The magistrate may permit the complainant to withdraw his complaint either against all or any of the accused, and there upon acquit the accused.

9. If a summon case is instituted otherwise than upon complaint magistrate first class or with the previous sanction of the Chief Judicial magistrate any other judicial magistrate may stop proceeding of any stage. If evidence of principal witnesses has already been recorded, the magistrate shall pronounce a judgement of acquittal and in any other case shall release the accused. Such release shall have the effect of discharge.

10. The magistrate may convert the summon trial in to a trial of warrant cases in interest of justice, if the summons case relates to an offence punishable with imprisonment for a term exceeding 6 months.

## **26. Summary Trial :-**

Summary trial is a speedy trial in which unnecessary formalities have been dispensed with. The trial is to be shortened or simplified by having recourse to certain provisions in matter of

- i) preparation of record ,
- ii) Recording of evidence,
- iii) Judgment ,end
- iv) The sentencing power with regard to imprisonment has also been limited to 3 months. The right of appeal in summary trial is also abridged.

Summary trial may be held by the following magistrates.

- 1) Chief Judicial Magistrate or 2) Metropolitan Magistrate, or 3) Magistrate first class if specially empowered to that effect.

The following offences may be tried summarily. Such offences are

- 1) Offences not punishable a) with death, b) imprisonment for life or c) imprisonment for a term exceeding 2 years.

- 2) Offence of theft, receiving retaining or assisting in the concealment or disposal of stolen property where the value of such property does not exceed 2000(two thousand) rupees.
- 3) Offence like lurking house trespass, house breaking (Section 454 and 456 ) insult with intent to provoke a breach of peace (section 504), Criminal intimidation (section 506,IPC) and Abetment of and attempt to commit any of the foregoing offences.
- 4) Offence under section 20 of the Cattle trespass Act.

Summary trial may be converted into any other regular trial. Magistrate Second class may try summarily any offence which is punishable only with or with imprisonment for a term not exceeding 6 months, if specially empowered in this behalf by the High Court.

In summary trial, the Magistrate shall record i) the substance of the evidence and shall pronounce judgement containing a brief statement of the reasons of the findings.

The record of the summary trial shall contain only the serial number of the case, date of commission of the offence date of complaint, name and address of the complainant, nature of the offence and value of the property in respect of which the

offence is committed ,plea of the accused, findings sentence and date of disposal of the case.

In summary trial the maximum period of imprisonment that may be awarded is 3 months. An accused convicted of more than one offence can not be sentenced for more than 3 months imprisonment in the aggregate 3 months imprisonment can be inflicted on each charge to run concurrently but not consecutively. The limit of 3 months only applies to substantive sentence of imprisonment and not to alternative sentence in default of payment of fine.

## **27. Res-Judicata in Criminal Law :-**

The Section 300 is based on the principle that no man's life or liberty shall be twice put in jeopardy for the same offence on the same set of facts. (AIR 1966 SC 64). There are certain principles and maxims on the subject. There is a well known principle known as res-judicata in Civil law. According to res-judicata, Suit or issue once decided by a court of competent jurisdiction cannot be re-agitated. Res- judicata bars subsequent litigations on the same matter. There is a maxim, Nemo debet lix vexari proeadem causa, which means no person should be twice disturbed for the same cause. The Section 300 also embodies within its narrow limits the principles of the

English common law pleas autrefois acquit, autrefois convict, which means already acquitted already convicted. That means if an accused has already been acquitted or convicted in any previous trial by a court of competent jurisdiction, he cannot be tried again for the same offence. Besides all these principles there is Article 20, clause (2) of the constitution which reads, no person shall be prosecuted and punished for the same offence more than once. This constitutional provision is known as bar against double jeopardy. All these principles and maxims unanimously suggest one thing that an accused once acquitted or convicted of any offence by a court of competent jurisdiction shall not be tried again for the same offence or based on same facts.

Section 300 corresponds the gist of above principles of res-judicata. In order to attract the main provisions of section 300 the following ingredients must be there :-

1. An accused must have been previously tried in a criminal case regarding any offence or though not actually tried but could have been tried for such offence, or might have been convicted for that.
2. That trial must have been held by a Court of competent jurisdiction.

3. In that trial the accused must have been either convicted or acquitted of such offence.

4. That, conviction or acquittal must be in force.

If the above ingredients are present then he accused can not be subject to a second trial for such offence or for any other offence based on the same facts.

However, the above general principle of res-judicata in criminal trial has a few exceptions. Such exceptions are :-

a) A person either acquitted or convicted of any offence may be tried again with the consent of the State Government for distinct offence for which a separate charge might have been framed against him at the former trial under section 220, clause (1).

(b) If a person is convicted of any offence but subsequently the consequence takes place constituting a different offence the accused may be afterwards tried again for the consequence provided the consequence did not happen or were not known to the when judgment was pronounced. For example, the accused is convicted for voluntarily causing hurt, but the injured subsequently died of the injury, than the accused shall be tried again for causing murder.

(c) An accused already tried for an offence can be tried again for another offence arising out of the same facts where the former court was not competent to try the offence subsequently charged. For example, A is charged and convicted by a Magistrate second class of theft of property. A may subsequently be tried for robbery on the same facts.

(d) If a person is discharged under Section 258, shall be tried again for the same offence with the consent of the court.

(e) Section 26 of the General Clauses Act provides that “where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either of any of those enactments, but shall not be liable to be punished twice for the same offence”. That means under Section 26 of the General Clauses Act, a person can't be convicted twice, but can be prosecuted twice. There is no bar for double prosecution (AIR 1957 SC 592). For example, if the former trial ends in acquittal, there is no bar to convict the accused at the second trial.

f) If a citizen of India commits an offence outside India, or a foreigner commits an offence on the high sea or on any Indian ship and was tried outside India, such

person with the previous sanction of the Central Government may be tried again at any place in India, under Section 188 Cr. PC.

(g) If a complaint is dismissed or the accused is discharged, such accused may be tried in a fresh trial as the dismissal of complaint or discharge of accused is not an acquittal. Even though the order is not set aside, fresh trial is not barred.

In view of the above, discussion the principles of res-judicata is applicable to subsequent criminal trial but subject to the above exceptions.

But it must be mentioned here that Section 300 does not apply to proceedings under Section 107 or 110 Cr. PC. as there is no trial for any offence. Departmental inquiry against Government servant on same facts after acquittal by court is not barred. An acquittal from an offence of theft would not prevent a civil action for the return of the things stolen or for their value upon the same evidence. The fact that matter in issue has already been decided in a civil litigation between the parties is no bar to the criminal court from taking cognizance. Appeal against acquittal is not barred by Session 300 (1991) ISCC 519 .

## **28. Tender of Pardon : (Section 306- 308)**

The provisions of Section 306 to 308 deal will tender of pardon to accomplice, and related matters. The code has neither defined "pardon" nor the term "accomplice". The term "pardon" means to excuse to forgive or to allow to go unpunished. The term "accomplice" means an associate crime or a co-accused. So the expression tender of pardon to an accomplice means to grant forgiveness to an co-accused so that he will go unpunished.

Though the Sections 300 and 307 deals with tender of pardon to an accomplice but the law is silent as to at whose instance the matter of tendering pardon will be initiated. The Supreme Court in Jasbeer Singh Vs. Vipin kumar Jaggi AIR 2001 SC2734, has pointed out although the power to actually grant the pardon is vested in the Court, obviously the court can have no interested whatso ever in the out some, nor can it decide for the prosecution whether particular evidence is required or not to ensure the conviction of the accused. That is the prosecutions job .If the prosecution thinks that the tender of pardon will be in the interest of a successful prosecution of the other offenders whose conviction is not easy without the approver's testimony, the court will indubitably agree to the tendering of pardon. The court must not

take on itself the task of determination of propriety of tendering pardon".

From the above observation it is clear that the matter of tendering pardon will be initiated by the prosecution. However, there is no legal bar for an accused to apply for grant of pardon under section 306 or 307.

The legislative intent behind the provisions of tendering pardon is to allow pardon to be tendered in a case where a grave offence is alleged to have been committed by several persons, so that with the aid of the evidence of the person pardoned the offence could be brought home to the rest of the accused. (AIR 1963 SC1850).

Tender of pardon may be granted either under Section 306 or 307 if the following conditions are there' such as-

- 1) A criminal case must be pending against several accused persons.
- 2) Sufficient evidence is not forthcoming in the case to prove the guilt of the accused.
- 3) Out of the several accused persons either one or a few shall be given the legal temptation of pardon so that they may come forward to speak the truth as to how the

offence was committed by them. Criminals by nature try to avoid detection and desire to keep matters secret. The persons involved in criminal in criminal activities in as many way as human ingenuity can device. That is why a legal temptation of pardon is tendered to some of the accused. So that they may co-operate with the prosecution by disclosing the truth of their complicity.

4) Five types of courts or Magistrates are empowered to tender pardon . They are :

a) Cheif Judicial Magistrate : During investigation inquiry or trial of the offence.

b) MetripolitanMagistarate :

c) Magistrate first class During inquiry inquiring in to or trying and trial. the offence :

d) Court of Session, or: At any time after Commitment of the cause but .

e) Court of Special judge :before judgment is passed.

5) Tender of pardon only can be given in the following offence-

a) Any offence triable exclusively by Court of Session.

b) Any offence trible exclusively by the court of a Special Judge appointed.

- c) Any offence punishable With imprisonment which may extend to 7 years or with more severe punishment.
- 6) Every Magistrate while tendering a pardon (a) shall record his reasons for why the pardon is tendered, and (b) Whether the tender of pardon was accepted by the accused to whom it was made.
- 7) Such accused shall be furnished with a copy of such record free of cost.
- 8) Every person accepting a tender of pardon shall be examined as a witness in the court of the Magistrate taking cognizance of the offence and also in the subsequent.
- 9) The person accepting the tender of pardon shall be detained in the custody until the terminate of the trial unless he is already on bail.
- 10) Where the person after accepting a tender of pardon has been examined as mentioned under point no.8 , the Magistrate shall commit the case to the appropriate Court for trial.
- 11) Tender of pardon is always made on condition. Such condition is that he (accomplice) should make (a) full and true disclosure of , (b) of the whole of the circumstances, (c) within his knowledge (d) relating to the offence and (e) to every other person concerned, whether as principal or abettor in the commission thereof. It may be mentioned here that pardon is granted not after disclosure is made but in anticipation of telling the whole truth.

The above procedures are to be following in matter of tendering pardon.

Tender of pardon is always conditional. If the accomplice fulfills the condition of the pardon, he shall not be punished for the offence he admits to have committed while making full and true disclosure. The accomplice forfeits the pardon if he willfully conceals anything essential or gives false evidence. He can then be tried for the offence which was pardoned but not jointly with the other accused. For such prosecution of the accomplice a certificate of the public prosecutor that he has not complied with the conditions of pardon is necessary. The accomplice can also be tried for giving false evidence in which case sanction of the High Court shall be necessary. In such trial of the accomplice the accomplice may plead that he has fulfilled the conditions of the pardon the on us shall be on the prosecution to prove non compliance of the terms of the pardon. The statement made by the accomplice accepting the tender of pardon and recorded by the Magistrate may be given in evidence against him at such trial.

Tender of pardon is a judicial temptation given to one of the co-accused to be a witness for prosecution against his erstwhile comrades, pardon plays a vital role in the punitive process of the criminal law.

## 29. probation and Admonition :

Crime and punishment are two sides of a coin. Acts or omissions made punishable is crime. Punishment is sine qua non of the concept of crime. Crimes are always visited with punishment. Punishment is of several types out of which imprisonment is one. The imprisonment is most frequently used by the criminal courts. Imprisonment as a punishment is not always beneficial. It has several adverse effects. Such as,

- 1) It allows a convict to be in close association with professional criminals and thereby helps a convict to be contaminated with criminal career.
- 2) It decreases the capacity of the convict to re-adjust to normal society after release.
- 3) It causes loss of job, and separation from family.
- 4) Strict discipline does not afford any guarantee that the prisoner has really transformed into a law abiding citizen. For all these evils imprisonment as a punishment (percolations of offender) is first to be avoided.

The term “probation” is derived from the Latin word “probare” which means to prove probation is a conditional release of an offender under suspension of punishment . Probation is a matter of discipline and treatment. It is an embodiment of a progressive criminal policy based upon the discretion of the court. Probation enables the convict to keep himself away from criminogenic association of prison. Probation is a treatment

reaction to law breaking. It is given to the first offenders and those offenders are selected under judicial scrutiny. Probation has received statutory recognition in India. Now probation is the rule and imprisonment is exception. Penology has undergone a great change in this regard.

Probation has been incorporated in the probation of offenders act,1958, Besides, that provisions have been made for probation and admonition under section 360 of Cr PC. Section 360 empowers the court to deal leniently with a person who has committed an offence for the first time by releasing him on probation of good conduct, instead of giving punishment in order to give him a chance of reforming himself ad to protect him form being corrupted and in order to give him a chance of reforming him self and to protect him from being corrupted and turned into a regular criminal by association with hardened criminal in jail. This provision applies to both young and adult offenders. The provisions of section 360 are based on reformatory theory. As the present day penology has been showing an increasing emphasis on the reformation and rehabilitation of the first offender as a useful and self reliant member of society without subjecting to the deleterious effects of jail life.

In order to attract the provisions of probation as givin under section 360, the following factors must be present.

- 1) The person to whom the probation may be

given must be a first offender. That means there must not be any previous conviction against him.

2) The person must have been found guilty of the offence.

3) Three categories are considered for probation. They are (a) any person not under 21 years of age it is convicted of an offence punishable (i) with fine only or with (ii) imprisonment for a term of 7 years or less.

(b) any person under 21 years of age or

(c) any woman if convicted of an offence not punishable with (i) death, or (ii) imprisonment for life.

4) The court shall consider (i) age (ii) character (iii) antecedents of the offender and (iv) the circumstances in which the offence was committed.

5) It must appear to the court that it is expedient that the offender should be released on probation of good conduct.

6) The power of granting probation shall be exercised by any judicial court except by a second class Magistrate. If not specially empowered by the High court in that behalf.

If the above ingredients are present the court may instead of sentencing him at once to any punishment direct that the convict may be released on probation on his entering into bond with or without sureties to (a) appear and (b) receive sentence when called upon during such period not exceeding 3 years and (c) in the mean time to keep

the peace and (d) be of good behavior.

Section 360 is divided into two parts. First part is for probation and the second part is devoted to admonition .

The term admonition has been defined. The term admonition etymologically means to condemn the criminal act of the offender with a warning. Admonition is given in milder offences. According to sun-section 3 of section 360, the following conditions must be present to release a person after due admonition.

- 1) The person must have been found guilty of an offence and convicted accordingly.
- 2) There must not be any previous conviction against him.
- 3) The person convicted must have been found guilty either of (a) theft (b) theft in a building (c) dishonest misappropriation (d) cheating (e) any offence under IPC punishable with not more than 2 years imprisonment or (f) any offence punishable with fine only.
- 4) The court must consider (a) age ( b) character,(c) antecedents (d) physical condition of the accused or (e) mental conditions of the offender (f) the trivial nature of the offence and , or (g) any extenuating circumstances under which the offence was committed.
- 5) The court must come to the conclusion that is a fit case to release the convict after due admonition.

If the above ingredients are present, any court may release the convict after due admonition.

It may be mentioned here that powers of probation and admonition may be exercised by any court exercising appellate or revisional jurisdiction.

A convict shall not be released on probation if the offender or his surety has no fixed place of aboard or regular occupation in the place where the offender is likely to live during the period of probation. If the convict violates the terms of probation, the court may issue warrant for his apprehension, and may punish him for his original offence at which he is found guilty after due inquiry.

Probation and admonition are the latest development of penal jurisprudence. As Justice V.R. Krishna Aiyar has observed that so many years of freedom have not freed our judiciary from the out dated British Indian Penology ,bearing on suppression of crime. And it is time our Magistracy bends to the winds of social change. probation and admonition are discretionary in nature and the court is to assign special reasons if probation and admonition are not resorted to in cases of first offenders. So the judiciary should play a greater role in this field.

### **30. Appeals :**

Subject of appeal may be divided into the following groups

- 1) Appeal against conviction
- 2) Appeal against acquittal
- 3) Appeal against inadequacy of sentence.

- 4) No appeal in certain cases.
- 5) Abatement of appeals and
- 6) Appeal against certain orders of executive Magistrate.

An appeal is a proceeding taken before a superior Court or authority for reversing or modifying a decision passed by an inferior court on ground of error. An appeal is a creature of law. There is no inherent right of appeal. Besides, the appeals provided under Chapter 29 of the code there are also other provisions which confer right of appeal. Those provisions are made under section 86, 237(7), 250(6), 3412, 449 456(3) and 458(2) of the code.

- 1) Appeals from conviction are dealt with under section 274, 379, 380. Any person convicted on a trial may prefer appeal against such order before the Appellate court as given below.

Conviction by	Appeal lies to
1) High Court in its extra, ordinary original criminal jurisdiction.	1) To the Supreme court.
2) High court reversing an order of acquittal and sentencing him either death or imprisonment for life.	2) The Supreme court.
3) Imprisonment for a term of 10 years or more passed by: a) Sessions judge. b) Additional Sessions judge	3) To the High Court.

<p>c) Any other court in which sentence of imprisonment for more than 7 years has been passed.</p> <p>4) Metropolitan magistrate or Assistance Sessions judge, or Magistrate first class, or Chief judicial Magistrate under Section 325 or order passed by any magistrate under section 360.</p>	<p>4) The Court of Session.</p>
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2) Appeal against acquittal has been provided under section 378.

Against the order of acquittal the state Govt. or Central govt. May direct the public prosecutor to present an appeal to the High Court. No such appeal shall be entertained without the leave of the High Court . If an order of acquittal is passed in any case instituted upon complaint, the complainant may prefer appeal after obtaining special leave to appeal from the High Court. The period of limitation for preferring appeal against acquittal is 6 months, if he complainant is a public servant and 60 days in every other case. If leave is refused there is no appeal against it.

3) Appeal against inadequacy of sentence :-

With regard to point no 3 stated above, the State Government or the Central Government may direct the public prosecutor to present an appeal to the High Court on the ground of

inadequacy of sentence. In such appeal the High court shall not enhance the sentence except after giving to the accused a reasonable opportunity of showing cause against such enhancement. The High Court may either acquit the accused enhance or reduce the sentence in appropriate cases.

4) Appeal is a creature of law but in certain cases right of appeal has been denied under section 375 and 376 of the Code.

- i) There is no appeal where the accused has been convicted on his plea of guilt, however, appeal may be preferred for legality of the sentence.
- ii) There shall be no appeal against the conviction in the following cases.
  - a) Where a High Court passes only a sentence of imprisonment for not exceeding 6 months or of fine exceeding one thousand rupees or of both.
  - b) Where a court of session or a metropolitan magistrate passes only a sentence of imprisonment for a term not exceeding 3 months or of fine not exceeding two hundred rupees.
  - c) Where a magistrate first class passes only a sentence of fine not exceeding 100 rupees.
  - d) In a case tried summarily under Section 260 magistrate passes only a sentence of fine not exceeding two hundred rupees.

However an appeal may be preferred against any such sentence if any other punishment is combined with it.

5) Abatement means end of the matter. An appeal abates on the death of the accused. Every appeal

against inadequacy of sentence or against acquittal shall finally abate on the death of the accuse. Every other appeal except appeal against fine shall abate on the death of the appellant.

But an appeal preferred against sentence of death of death or of imprisonment shall not abate on the death of the appellant if any of his near relatives applies within 30 days of such death to the appellate court for leave to continue the appeal and if leave is granted.

The appellate court may dismiss an appeal summarily if there is no sufficient ground for interference. The appellate court shall pursue the records and hear the parties or their lawyers and may reverse the finding may reverse or alter the finding and sentence and either acquit or discharge the accused or may order for re-trial of the case. The appellate court has power to suspend the sentence during pending of the appeal and may release the appellant on bail. In appeal against acquittal the appellate court (High Court ) may issue warrant directing the arrest of the accused. If the convicted person is in jail he may present his petition of appeal to the officer-in-charge of jail who shall forward it to the proper appellate court.

6) With regard to appeal against certain orders of Executive Magistrate any person who has been ordered under section 117 to give security for keeping the peace or for good behavior or who is aggrieved by any order refusing to accepting or rejecting a surety under section 121 may prefer appeal to the court of session. Though the original

order is passed by an executive magistrate the appellate authority is the Court of session.

### **31. Reference :**

Reference is a judicial act. Matter of reference has been provided under section 395 and 396 of the Code. For the purpose of making reference the following requirements must be there.

1. A criminal case must be pending before any court.
2. The case must involve a question as to the validity of any Act, Ordinance, Regulation or its provisions.
3. The final disposal of the case is not possible unless that question of validity is decided first.
4. The court must be of the opinion that such Act, Ordinance, Regulation, or provision is invalid or inoperative.
5. Neither the high court to which that court is subordinate nor the Supreme Court has decided the above question of validity.

If the above factors are present, then the court shall, a) state the case, b) set out its opinion, c) give reasons therefore, d) refer the matter to the high court for its decision.

Reference is always made only the High Court . The court making the reference shall not proceed with the case and shall wait till the high court communicates its decision on reference.

### **32. Bail :**

The term bail has not been defined. Bail means release from restraint. An order of bail gives back to the accused freedom of his movement on condition that he will appear to face his trial. Personal recognizance, surety ship bonds and such other modalities are the means by which an assurance is secured for the presence of the accused at the trial. (AIR 1980 SC 1632).

The subject of bail may be divided into 3 groups.

- 1.Bail in bailable offences. (Section -436)
- 2.Bail in non-bailable offences, and (section-437).
- 3.Pre- arrest order for bail, which is popularly known as anticipatory bail.(Section-438)

Bail in bailable offences is a matter of right, provided the accused complies with the conditions of the bail. Section 436 is imperative, a person coming under section 436 can not taken in to custody unless he is either unable or unwilling to offer bail or to execute bond.

Section 437 deals with bail in non-bailable offences by the court of a magistrate. The power of high court and court of session are expressly excluded from section 437. The powers of high court and court of session regarding bail have been provided under section 439.

Granting of bail in non-bailable offences is

discretionary in nature. The term non-bailable does not mean that bail can not be granted.

Since grant of bail is a matter of discretion such discretion, must be exercised keeping in view of the provisions of the Code and the well established principles, on the subject.

Section 437 provides certain restriction in the discretionary powers of a court in matter of granting bail such restrictions are

1. Any person accused of any non bailable offence shall not be released on bail if there is reasonable grounds for believing that he is guilty of an offence punishable with either death or imprisonment for life.

2. Any person accused of any non-bailable offence shall not be released on bail if

a) such offence is a cognizable offence and

b) he had been previously convicted of an offence punishable either with death, or imprisonment for life, or imprisonment for 7 years or more.

3. If such person is accused of cognizable offence had been previously convicted on two or more occasions of a non-bailable and cognizable offence.

The above 3 restrictions may be relaxed and the person may be released on bail if such person is a) under the age of 16 years, or b) is a women, or c) if the court is satisfied that it is just and proper to release any person on bail for any other special reason. The authority may release the accused on

bail at any stage of investigation , inquiry or trial if it appears that there are no reasonable grounds for believing that the accused has committed a non-bailable offence. At the time of releasing the accused on bail the court may impose any condition. Such conditions may be to ensure the attendance of the accused and to ensure that such person shall not commit any offence.

1. If the trial of a person accused of any non-bailable offence is not concluded within a period of 60 days from the first date fixed for taking evidence and such person is in custody during the whole of the said period such person shall be released on bail.

That the Supreme Court on different occasions has given same guide lines in matter of bail concerning non-bailable offence. The sum and substance of such guidelines are, the court shall take into consideration the following factors while granting bail. such as :

1. The nature and gravity of the circumstances in which the offence is committed.
2. The severity of punishment which a conviction will entail.
3. Nature of evidence received so far.
4. The position and status of the accused with reference to the victim and witnesses.
5. The likelihood of the accused to abscond.
6. The danger of the offence being continued or repeated if enlarged.

7. Likelihood or tampering witnesses.
8. The period on custody and the likelihood of delay in the trial.
9. Opportunity to prepare defence and
10. The health or sex or age of the accused.

On this point reference may be made to cases reported in AIR SC 1016, AIR 1978 SC 179, AIR1978 SC 527 AND AIR 1978 SC 429.

### **33. Anticipatory Bail :**

The subject of bail may be divided into two categories.

(1) Pre-arrest bail and (2) Post-arrest bail

When a person is made accused in a case, he is arrested or brought or he appears before a court. Such person can apply for bail. That bail comes under the second category (post arrest bail). But when a person is neither arrested, nor any case is instituted against him, he may move the appropriate court for bail , if he has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence. This type of bail comes under the first category. This is popularly known as anticipatory bail. Special power have been conferred only the High Court and court of session for directing a person to be released on bail previous to his arrest. As the Supreme Court has said that , the salutary provision has been enshrined in section 438 to see in that the liberty of

the subject is not put in jeopardy on frivolous grounds at the instance of unscrupulous or irresponsible persons or officer who may be in charge of prosecution. ( AIR 1977 SC 366).

The Supreme Court in Guru Baksh Singh Vs State of punjab AIR 1980 SC 1632 has laid down the following principles to be followed relating to grant of anticipatory bail.

1. The appellant must show that he has reason to believe hat he may be arrested on an accusation of having committed a non-bailable offence.
2. The High Court or court of session must apply its mind to the question and decide whether a case has been made out for grant of anticipatory bail.
3. Filing of first information report is not a condition precedent to the exercise of the power under section 438.
4. Anticipatory bail can be granted even after an FIR is filed, so long as the applicant has not been arrested.
5. Provisions of section 438 can not be invoked after the arrest of the accused.
6. It is necessary for the courts which grant anticipatory bail to take care to specify the offence on respect of which alone the order will be effective.
7. The court should limit the operation of the order to a short period.
8. Anticipatory bail can be passed without to the

public prosecutor.

Anticipatory bail is not a bail. It is rather a pre-arrest order for bail and direction to the arresting authority that in the event of such arrest he shall be released on bail. Anticipatory bail may be made subject to certain conditions as enumerated under section 438(2). Such conditions may be

- i) The person shall make himself available for interrogation, in the case as and when required by the police.
- ii) He shall not make any inducement, threat or promise to the witnesses.
- iii) He shall not leave India without previous permission of the court and
- iv) Such other conditions as may be imposed under section 437(3).

### **34. Short Notes on :**

#### **(i) Attachment- (Section – 83) :**

The term attachment has not been defined in the Code. Attachment means to bring the property movable immovable or both under the judicial control of the court. The attachment of properties is ordered when the person either absconds or conceals himself, so that warrant issued against him can not be executed. When such proclaimed person is about to remove or dispose of either whole or any part of his property from the local jurisdiction of the court. The court may pass order of attachment of his properties.

If the property ordered to be attached is a dept or movable property the attachment is made either by seizure or by appointment of a receiver or by an order prohibiting the delivery of such property or by all such methods. If the property is a land paying revenue, the attachment is made through the Collector of the District in which the land is situate.

If the property ordered to be attached consists of livestock or is of perishable nature, the court may order for sale of such property. Attachment made under section 83 Cr PC and attachment made under provisions of CPS are different. The object of attachment under section 83 is compel the proclaimed person to appear before the court a property is attached the court is bound to hear the claims and objection made to the attachment and in suitable cases may release, sell or restore the attached property. Any person whose claim or objection has been disallowed may within a period of one year from the date of such order institute a suit to establish his right. The court shall release the property from attachment if the proclaimed person appears within the time specified in the proclamation.

## (ii) Letter Rogatory (Section -160-A ,160- B)

Law relating to letter Rotatory has been provided under S. 160 -B, Cr. PC. Letter Rogatory is letter f request made by a court addressed to an authority in a foreign country. During investigation of a case if an application is made by the investigating officer or any officer superior in rank to

him with the fact that evidence of required for the case is available in a country or place outside India, any criminal court may issue a letter of request to a court or an authority in that country requesting it to examine any person to record his statement or to reduce any document or thing and to forward the same to the court issuing such letter. Letter Rogatory may be sent by any criminal court to any foreign court or authority similarly foreign criminal court may also issue such letter to any Indian court. Any statement recorded or document or thing received through letter Rogatory shall be deemed to be the evidence collected during the course of investigation.

(iii) Order of Remand :

The term remand means to send back. The term remand as has been used in section 167 Cr PC means to send back the accused into custody awaiting further evidence.

Investigation of a case by the police ought to be completed within 24 hours. When any person is arrested and detained in custody and the investigation of the case can not be completed within 24 hours and there are grounds for believing that the accusation against the person is well founded, it is obligatory on the part of the investigating officer to produce the arrestee before the nearest judicial magistrate along with a copy of the entries in the case diary under section 167. The magistrate if thinks fit may authorize the detention of the accused in custody. This authorization of

detention is known as order of remand. Such order of remand by judicial magistrate shall be for a term not exceeding 15 days at a time. The order of remand passed by an executive magistrate shall not exceed 7 days.

If the judicial magistrate is satisfied that further detention of the accused is justified , he may pass successive orders of remand, not exceeding a term of 15 days each during investigation.

The provisions of section 167 have put some restrictions on the above power of successive remand. Such restrictions are :-

1. If the investigation in to the case completed and the charge sheet is not filed before the expire of the period of detention of the accused which may be 90 days pr 60 days as the case may be the accused is entitled to be released on bail under provisions of section 168(2) (a). No discretion what so ever is left to the magistrate. The total period of remand shall not exceed 90 days where the investigation relates to an offence punishable with death or imprisonment for life or imprisonment for a term not less than 10 days and 60 days in any other case. The Government of Orissa has by amendment substituted the above 90 days by 120 days.

2. The further restriction as imposed by section 167, is that the person detained must be physically produced before the magistrate at the time of making further remand.

3. The physical production of the accused may be proved by his signature on the order authorizing

detention.

4. No second class magistrate if not specially empowered by the High Court shall remand the person to police custody. The magistrate remanding a person to police custody must record his reasons for so doing. If a person is continuously in detention for a period of 120 days, 90 days or 60 days as the case may be and charge sheet has not been filed before the magistrate during such period, the accused acquires a valuable right to be released on bail provided he furnishes bail.

The power of a magistrate for passing successive remand orders are controlled by section 167.

(iv) Set-off (Section -428) :

The term set-off means adjustment Section 428 provided for set-off. According to the provisions of Section 428 a pre-conviction detention of an accused shall be set-off against the term of imprisonment imposed on him. The supreme court has observed in Hardev AIR 1975 SC 179 to the effect that the court convicting the accused should specify in their orders the total period of pre-conviction detention undergone by the convict during investigation inquiry and trial for the purpose of enabling the authorities concerned to give effect to section 428. This provision of set-off has been introduced in the code so that it would go a long way to mitigate the evils of jail. An accused sentenced to imprisonment for life is not entitled to the benefit of set-off. If a sentence of imprisonment is in default of fine, no set-off is available.

(v) Commutation of sentence :

The term commutation means to change. The power of commutation has been provided under section 54 and 55 IPC and 433 and 433-A, 434 Cr PC.

Power of commutation is a power which shall be exercised by the appropriate government. According to section 433, the appropriate government may commute.

- a) A sentence of death- for any other punishable provided by IPC.
- b) Imprisonment for life- for imprisonment not exceeding 14 years or fine.
- c) Rigorous imprisonment- for simple imprisonment or for fine
- d) Simple imprisonment – for fine.

Section 433-A provides restriction on premature

release of a convict. According to the provisions of section 433-A, if a person sentenced to undergo imprisonment for life for an offence for which (a) either death is one of the punishments provided by law, or (b) a sentence of death imposed has been commuted to imprisonment for life, such convict shall not be released from prison, unless he has served at least 14 years of imprisonment.

Where in a case governed by section 433-A, the convict has completed his detention in full 14

years he can not claim a direction for their premature release on the basis of reconviction detention and remissions earned by him (1990Cr Lj 234).

Section 433-A, is constitutionally valid and is not violative of Article 14 and 20 of the Constitution.

(vi) Compensation :

The term compensation means to make up or to recoup the loss sustained. The power to order for compensation has been made under section 237,250,357,358,359.

According to section 237 and 250 court may award compensation to the accused when there was no reasonable ground for making accusation against him. But before passing an order for compensation sufficient time should be allowed to the party to show cause why he should not be asked to pay compensation. In default of payment of compensation the person may be ordered to undergo simple imprisonment for a period not exceeding 30 days. The order to pay compensation is appealable. The compensation awarded shall be taken into consideration by the Civil Court in awarding compensation in subsequent civil relating to the same matter.

Under section 357 when a court imposes sentence of fine, the whole or any part of the fine may be paid by way of compensation to the prosecution for the expenses incurred or for loss or injury caused to the victim by such offence. If no

fine is imposed court has also power to ask the convicted accused to pay compensation to make good the loss or injury suffered by the victim.

Under section 358 compensation may be awarded not exceeding 100 rupees to persons ground lessly arrested on the false information. All compensation may be recovered as if were a fine Under section 359 court has power to ask the convict to pay to the complainant the cost incurred by the prosecution.

\* \*        \*\*        \*\*        \*\*        \*\*