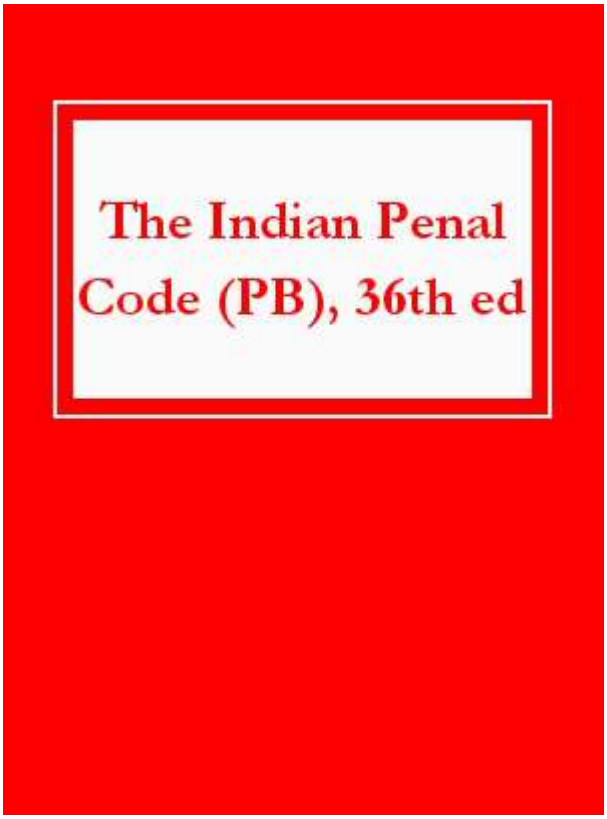
The Indian Penal Code (PB), 36th ed



Ratanlal & Dhirajlal: Indian Penal Code (PB) / 1263. Ins. by Act 13 of 2013, section 9 (w.r.e.f. 3-2-2013). [s 376E] Punishment for repeat offenders.

Currency Date: 28 April 2020

THE INDIAN PENAL CODE

CHAPTER XVI OF OFFENCES AFFECTING THE HUMAN BODY OF OFFENCES AFFECTING LIFE

[1172.][Sexual Offences]

[1263.][s 376E] Punishment for repeat offenders.

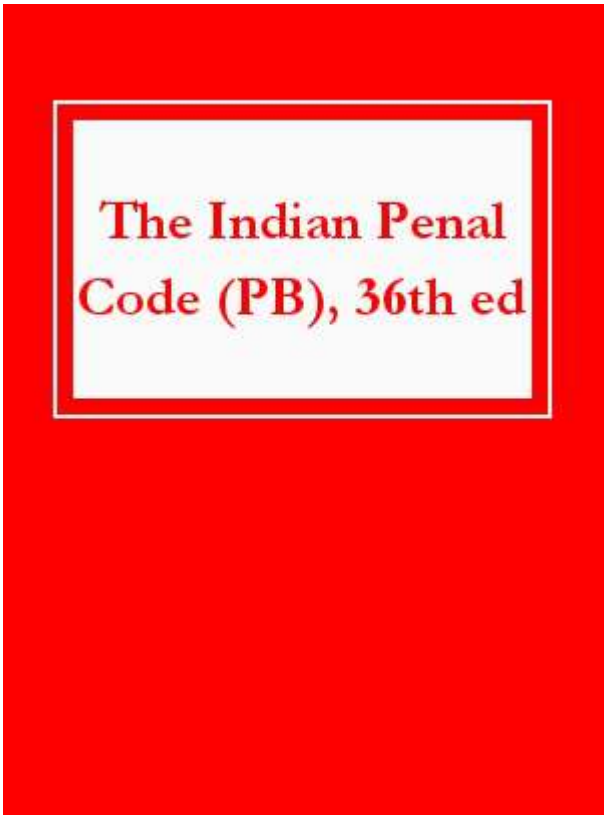
Whoever has been previously convicted of an offence punishable under section 376 or section 376A or [1264.][section 376AB or section 376D or section 376DA or section 376DB,] and is subsequently convicted of an offence punishable under any of the said sections shall be punished with imprisonment for life which shall mean imprisonment for the remainder of that person's natural life, or with death.]

1172. Subs. by Act 43 of 1983, section 3, for the heading "Of rape" (w.e.f. 25 December 1983).

1263. Ins. by Act 13 of 2013, section 9 (w.r.e.f. 3-2-2013).

1264. Subs. by Act 22 of 2018, section 7, for "section 376D" (w.r.e.f. 21-4-2018).

The Indian Penal Code (PB), 36th ed



Ratanlal & Dhirajlal: Indian Penal Code (PB) / [s 377] Unnatural offences.

Currency Date: 28 April 2020

THE INDIAN PENAL CODE

CHAPTER XVI OF OFFENCES AFFECTING THE HUMAN BODY OF OFFENCES AFFECTING LIFE

Of Unnatural Offences

[s 377] Unnatural offences.

Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with [1265.][imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

***Explanation.*—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.**

COMMENT.—

This section was intended to punish the offence of sodomy, buggery and bestiality. The offence purported to consist in a carnal knowledge committed against the order of nature by a person with a man, or in the same unnatural manner with a woman, or by a man or woman in any manner with an animal. To attract the above offence, the following ingredients were required: 1) Carnal intercourse and 2) against the order of nature.

[s 377.1] Constitutionality of section 377.—*Naz* Judgment.—

The Delhi High Court in a landmark judgment declared section 377 IPC, 1860 unconstitutional, insofar it criminalised consensual sexual acts of adults in private as violative of Articles 21, 14 and 15 of the Constitution.[1266.] But in *Suresh Kumar Koushal v NAZ Foundation*,[1267.] the Supreme Court overruled the Delhi High Court judgment holding that those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature constitute different classes and the people falling in the latter category cannot claim that section 377 suffers from the vice of arbitrariness and irrational classification. What section 377 does is merely to define the particular offence and prescribe punishment for the same which can be awarded if in the trial conducted in accordance with the provisions of the Cr PC, 1973 and other statutes of the same family the person is found guilty. Therefore, section 377 IPC, 1860 was held to be not *ultra vires* Articles 14 and 15 of the Constitution. It was also observed by the Supreme Court that the Court merely pronounced on the correctness of the view taken by the Delhi High Court on the constitutionality of section 377 IPC, 1860 and found that the said section did not suffer from any constitutional infirmity. Notwithstanding this verdict, the competent legislature shall be free to consider the desirability and propriety of deleting section 377 IPC, 1860 from the statute book or amend the same.

A constitution bench of the Supreme Court in *Navtej Singh Johar v UOI*,[1268.] overruled Suresh Kumar Koushal and held that consensual carnal intercourse among adults in private space, does not in any way harm public decency or morality. Therefore, section

377 in its present form violates Article 19(1)(a). The court held that so far as section 377 penalises any consensual sexual relationship between two adults, be it homosexuals (man and man), heterosexuals (man and woman) or lesbians (woman and woman), cannot be regarded as constitutional. However, if anyone engages in any kind of sexual activity with animal, said aspect of section 377 is constitutional and it shall remain a penal offence. The court held that any act of description covered under section 377 done between two individuals without consent of any one of them would invite penal liability. Further, non-consensual acts which have been criminalised by virtue of section 377 have already been designated as penal offences under section 375 and under POCSO Act, 2012.

[s 377.2] Section 375 not subject to section 377.—

In *Navtej Singh Johar v UOI,*[1269.] the Supreme Court further held that section 375 gives due recognition to absence of 'wilful and informed consent' for act to be termed as rape, per contra, section 377 which does not contain any such qualification. Section 375, as substituted by the Criminal Law (Amendment) Act, 2013, does not use words 'subject to any other provision of IPC' which indicates that section 375 is not subject to section 377. Criminalisation of carnal intercourse between two adults was held legally unsustainable.

[s 377.3] Penetration.—

The explanation states that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. Section 377 of IPC, 1860 presupposes carnal intercourse against the order of nature.[1270.] As in rape so also in an unnatural offence even the slightest degree of penetration is enough and it is not necessary to prove the completion of the intercourse by the emission of seed.[1271.]

In a case arising out of unnatural offence, it was held that the acts alleged against the accused falling into two categories (1) sexual intercourse per OS (mouth) and (2) manipulation and movement of penis of the accused whilst being held by the victims in such a way as to create orifice like thing for making manipulated movement of insertion and withdrawal till ejaculation of semen, fell within the sweep of unnatural carnal offences and quashing of proceedings was not warranted.[1272.]

The victim girl aged seven years was in the care and custody of the accused and the offences were committed by him over a period of time. Medical evidence and DNA profile conclusively established commission of natural and unnatural sexual acts on the deceased by the accused. Imposition of the maximum punishment awardable for the said offences, i.e., life imprisonment was held perfectly justified.[1273.]

[s 377.4] Anal intercourse—Sodomy, medical evidence.—

When an expert categorically ruled out the commission of an unnatural offence having regard to his expertise, it was obligatory on the part of the prosecution to draw his attention so as to enable him to furnish an explanation. It was contended that lacerations are likely to disappear if the examination is made after two to three days and nature of injuries would also depend upon several factors. The doctor in his evidence stated that the tissues around the anus are hard and rough. At the time of answering the calls of nature, the extra skin will be expanded. Immediately after it will

come to original status. By examination it was found that the boy was not habitually used for anal intercourse. If there is continuous act of intercourse for about a week or even two, three days it can be found out as to whether he had any intercourse or not. It may be true that absence of medical evidence by itself is not a crucial factor in all cases, but, the same has to be taken into consideration as a relevant factor when other evidence points towards the innocence of the appellant. It was not a case where only one view was possible. It is a well-settled principle of law that where two views are possible, the High Court would not ordinarily interfere with the judgment of acquittal.[1274.]

[s 377.5] Conviction without charge.—

Though medical evidence shows that victim was subjected to rape and carnal intercourse on more than one occasion before she was murdered, there was no charge of sodomy under section 377 IPC, 1860 framed by trial Court. It was held that accused cannot be convicted under section 377.[1275.]

1265. Subs. by Act 26 of 1955, section 117 and Sch, for "transportation for life" (w.e.f. 1-1-1956).

1266. *Naz Foundation v Government of NCT of Delhi*, 2010 Cr LJ 94 (Del).

1267. *Suresh Kumar Koushal v NAZ Foundation,* AIR 2014 SC 563 [LNIND 2013 SC 1059] : 2014 Cr LJ 784 .

1268. *Navtej Singh Johar v UOI*, AIR 2018 SC 4321 .

1269. *Navtej Singh Johar v UOI,* AIR 2018 SC 4321 .

1270. *Kailash Laxman Khamkar v State of Maharashtra,* 2010 Cr LJ 3255 (Bom).

1271. *Hughes,* (1841) 9 C & P 752; See also *GD Ghadge*, 1980 Cr LJ 1380 (Bom).

1272. *Brother John Antony v State of TN,* 1992 Cr LJ 1352 (Mad). The court explained the meaning and scope of the unnatural offence and referred to various authorities on this subject.

1273. *Rajesh v State of MP,* AIR 2017 SC 532 [LNINDORD 2016 SC 11435] .

1274. *Gowrishankara Swamigalu v State of Karnataka,* (2008) 14 SCC 411 [LNIND 2008 SC 598] : AIR 2008 SC 2349 [LNIND 2008 SC 598] : 2008 Cr LJ 3042 . The offence was supposed to have been committed for seven consecutive days at 8 a.m. in the office room a part of which was converted into a bed room. The whole thing sounded like unnatural.

1275. *State of Maharashtra v Shankar Krisanrao Khade,* 2009 Cr LJ 73 (Bom).

THE INDIAN PENAL CODE

CHAPTER XVII OF OFFENCES AGAINST PROPERTY

Of Theft

[s 378] Theft.

Whoever, intending to take dishonestly[1.] any movable property[2.] out of the possession of any person[3.] without that person's consent,[4.] moves that property[5.] in order to such taking, is said to commit theft.

Explanation 1.—A thing so long as it is attached to the earth, not being movable property, is not the subject of theft; but it becomes capable of being the subject of theft as soon as it is severed from the earth.

Explanation 2.—A moving effected by the same act which affects the severance may be a theft.

Explanation 3.—A person is said to cause a thing to move by removing an obstacle which prevented it from moving or by separating it from any other thing, as well as by actually moving it.

Explanation 4.—A person, who by any means causes an animal to move, is said to move that animal, and to move everything which, in consequence of the motion so caused, is moved by that animal.

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

ILLUSTRATIONS

(a) A cuts down a tree on Z's ground, with the intention of dishonestly taking the tree out of Z's possession without Z's consent. Here, as soon as A has severed the tree in order to such taking, he has committed theft.

(b) A puts a bait for dogs in his pocket, and thus induces Z's dog to follow it. Here, if A's intention be dishonestly to take the dog out of Z's possession without Z's consent. A has committed theft as soon as Z's dog has begun to follow A.

(c) A meets a bullock carrying a box of treasure. He drives the bullock in a certain direction, in order that he may dishonestly take the treasure. As soon as the bullock begins to move, A has committed theft of the treasure.

(d) A, being Z's servant, and entrusted by Z with the care of Z's plate, dishonestly runs away with the plate, without Z's consent. A has committed theft.

(e) Z, going on a journey, entrusts his plate to A, the keeper of the warehouse, till Z shall return. A carries the plate to a goldsmith and sells it. Here the plate was not in Z's possession. It could not therefore be taken out of Z's possession, and

A has not committed theft, though he may have committed criminal breach of trust.

(f) A finds a ring belonging to Z on a table in the house which Z occupies. Here the ring is in Z's possession, and if A dishonestly removes it, A commits theft.

(g) A finds a ring lying on the highroad, not in the possession of any person. A by taking it, commits no theft, though he may commit criminal misappropriation of property.

(h) A sees a ring belonging to Z lying on a table in Z's house. Not venturing to misappropriate the ring immediately for fear of search and detection, A hides the ring in a place where it is highly improbable that it will ever be found by Z, with the intention of taking the ring from the hiding place and selling it when the loss is forgotten. Here A, at the time of first moving the ring, commits theft.

(i) A delivers his watch to Z, a jeweller, to be regulated. Z carries it to his shop. A, not owing to the jeweller any debt for which the jeweller might lawfully detain the watch as a security, enters the shop openly, takes his watch by force out of Z's hand, and carries it away. Here A, though he may have committed criminal trespass and assault, has not committed theft, inasmuch as what he did was not done dishonestly.

(j) If A owes money to Z for repairing the watch, and if Z retains the watch lawfully as a security for the debt, and A takes the watch out of Z's possession, with the intention of depriving Z of the property as a security for his debt, he commits theft, inasmuch as he takes it dishonestly.

(k) Again, if A, having pawned his watch to Z, takes it out of Z's possession without Z's consent, not having paid what he borrowed on the watch, he commits theft, though the watch is his own property inasmuch as he takes it dishonestly.

(l) A takes an article belonging to Z out of Z's possession, without Z's consent, with the intention of keeping it until he obtains money from Z as a reward for its restoration. Here A takes dishonestly; A has therefore committed theft.

(m) A, being on friendly terms with Z, goes into Z's library in Z's absence, and takes away a book without Z's express consent for the purpose merely of reading it, and with the intention of returning it. Here, it is probable that A may have conceived that he had Z's implied consent to use Z's book. If this was A's impression, A has not committed theft.

(n) A asks charity from Z's wife. She gives A money, food and clothes, which A knows to belong to Z her husband. Here it is probable that A may conceive that Z's wife is authorised to give away alms. If this was A's impression, A has not committed theft.

(o) A is the paramour of Z's wife. She gives A valuable property, which A knows to belong to her husband Z, and to be such property as she has no authority from Z to give. If A takes the property dishonestly, he commits theft.

(p) A, in good faith, believing property belonging to Z to be A's own property, takes

that property out of B's possession. Here, as A does not take dishonestly, he does not commit theft.

COMMENT—

Section 378 of the Indian Penal Code, 1860 (IPC, 1860) defines 'theft' as the dishonest removal of movable property 'out of the possession of any person' without the consent of that person. 'Theft', has the following ingredients, namely, (i) dishonest intention to take property; (ii) the property must be movable; (ii) it should be taken out of the possession of another person; (iv) it should be taken without the consent of that person; and (v) there must be some moving of the property in order to accomplish the taking of it.

To bring home an offence under section 378 IPC, 1860, the prosecution is to prove (a) that there was a movable property; (b) that the said movable property was in the possession of person other than the accused; (c) that the accused took it out or moved it out of the possession of the said person; (d) that the accused did it dishonestly, i.e., with intention to cause wrongful gain to himself or wrongful loss to another; (e) that the accused took the movable property or moved it without the consent of the possessor of the movable property.[1]

The Criminal Court is not required to adjudicate on rival claims of title claimed by the parties. All that the Criminal Court has to decide is whether at the time of the alleged incident the property which is the subject-matter of theft was in the 'possession' of the complainant and whether it was taken out of the possession of the complainant with a dishonest intention.[2]

1. *Prafula Saikia v State of Assam*, 2012 Cr LJ 3889 (Gau).
2. *P T Rajan Babu v Anitha Chandra Babu*, 2011 Cr LJ 4541 (Ker).
3. *Nobin Chunder Holder*, (1866) 6 WR (Cr) 79.
4. *Ramratan*, AIR 1965 SC 926 [LNIND 1964 SC 365] : (1965) 2 Cr LJ 18 .
5. *Rameshwar Singh*, (1936) 12 Luck 92 .

THE INDIAN PENAL CODE

CHAPTER XVII OF OFFENCES AGAINST PROPERTY

Of Theft

[s 379] Punishment for theft.

Whoever commits theft shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENT—

In order to constitute theft five factors are essential:—

(1) Dishonest intention to take property;

(2) The property must be movable;

(3) The property should be taken out of the possession of another person;

(4) The property should be taken without the consent of that person; and

(5) There must be some moving of the property in order to accomplish the taking of it.

1. 'Intending to take dishonestly'.—Intention is the gist of the offence. The intention to take dishonestly exists when the taker intends to cause wrongful gain to one person or wrongful loss to another person. Where, therefore, the accused acting *bona fide* in the interests of his employers finding a party of fishermen poaching on his master's fisheries, took charge of the nets and retained possession of them, pending the orders of his employers, it was held that he was not guilty of theft.[3] When a person seizes cattle on the ground that they were trespassing on his land and causing damage to his crop or produce and gives out that he is taking them to the cattle pound, he commits no offence of theft, and however mistaken he may be about his right to that land or crop. He has no dishonest intention.[4] Where a respectable person just pinches the cycle of another person, as his own cycle at the time was missing, and brings it back and the important element of criminal intention is completely absent and he did not intend by his act to cause wrongful gain to himself, it does not amount to theft.[5]

The intention to take dishonestly must exist at the time of the moving of the property [*vide* ill. (h)]. The taking must be dishonest. It is not necessary that the taking must cause wrongful gain to the talker; it will suffice if it causes wrongful loss to the owner.[6.] Thus, where the accused took the complainant's three cows against her will and distributed them among her creditors, he was found guilty of stealing.[7.] It makes no difference in the accused's guilt that the act was not intended to procure any personal benefit to him. Could it be said that a servant would not be guilty of theft if he were to deliver over his master's plate to a pressing tailor, and tell him to pay himself? If the act done was not done *animo furtandi*, it will not amount to theft. It is no more stealing than it will be to take a stick out of a man's hand to beat him with it.[8.]

[s 379.1] Taking need not be with intent to retain property permanently.—