

The occurrence had taken place twenty nine years ago and the appellant has remained in custody for a period of more than six months. The Supreme Court while upholding the conviction of the appellant, sentence of imprisonment awarded against him is reduced to the period already undergone by him.<sup>248</sup>.

<sup>240</sup>. *Jain Lal*, (1942) 21 Pat 667.

<sup>241</sup>. *Ramesh Chandra Banerjee*, (1913) 41 Cal 350 ; *Madhusudan Sen Gupta*, AIR 1958 Cal 25 [LNIND 1957 CAL 48] . *Shiv Ram Singh v State of UP*, 1999 Cr LJ 4103 (All), assembly in preparation for dacoity on trucks and other motor vehicles, spot arrests, 2 years RI imposed. Another case of the same kind *Radharaman v State of UP*, 1997 Cr LJ 4129 (All), arrest by police party when the accused assembled for preparation for dacoity, independent public witnesses.

<sup>242</sup>. *Naushera v State*, 1982 Cr LJ 29 (P&H). *Shravan Dashrath v State of Maharashtra*, 1998 Cr LJ 1196 (Bom), the same distinction stated.

<sup>243</sup>. *Asgar v State of Rajasthan*, 2003 Cr LJ 1997 ; In *Karam Dass v State*, AIR 1952 Pun 249 : 1952 Cr LJ 1119 , the Punjab High Court held that to bring the case within section 399 of the Code, it is not necessary that persons shown to be making the preparations should be five or more in number. It is, however, necessary for the prosecution to prove that the raid for which the persons prosecuted were making preparation was to be committed by five or more persons, for otherwise it would not be dacoity but merely robbery, and mere preparation for committing robbery, unless it ends in an actual attempt, is not punishable by law.

<sup>244</sup>. *Koppula Venkat Rao v State of Andhra Pradesh*, AIR 2004 SC 1874 [LNIND 2004 SC 301] : (2004) 3 SCC 602 [LNIND 2004 SC 301] .

<sup>245</sup>. *Birbal B Chouhan v State of Chhattisgarh*, AIR 2012 SC 911 [LNIND 2011 SC 1157] : (2011) 10 SCC 776 [LNIND 2011 SC 1157] .

<sup>246</sup>. *Brijlal Mandal*, 1978 Cr LJ 877 (Pat); see also *Gholtu Modi*, 1986 Cr LJ 1031 (Pat). *Suleman v State of Delhi*, AIR 1999 SC 1707 [LNIND 1999 SC 133] : 1999 Cr LJ 2525 , persons staying in *Dharamsala* at noon, witness stated that he overheard them talking about their plan to loot a petrol pump, it did not seem to be truthful to the court, their conviction under sections 399 and 402 was held to be not proper. *Shiv Ram Singh v State of UP*, 1999 Cr LJ 4103 (All), criminals caught on spot alongwith articles, the sentence of two years RI being already on the lower side, no scope for further reduction. *Ram Sewak v State of UP*, 1999 Cr LJ 4680 (All), failure to prove that accused assembled in preparation for dacoity. Another similar case is *Sukhlal v State of MP*, 1998 Cr LJ 1366 (MP).

<sup>247</sup>. *Chaturi Yadav*, 1979 Cr LJ 1090 : AIR 1990 SC 1412 [LNIND 1998 SC 579] .

<sup>248</sup>. *Nasir v State of UP*, AIR 2010 SC 1926 [LNIND 2009 SC 1517] : (2010) 13 SCC 251 [LNIND 2009 SC 1517] ; *Ravi Rajwar v State of Bihar*, 2003 Cr LJ 634 (Pat).

# THE INDIAN PENAL CODE

## CHAPTER XVII OF OFFENCES AGAINST PROPERTY

### Of Theft

### Of Robbery and Dacoity

#### [s 400] Punishment for belonging to gang of dacoits.

Whoever, at any time after the passing of this Act, shall belong to a gang of persons associated for the purpose of habitually committing dacoity, shall be punished with <sup>249.</sup>[imprisonment for life], or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

#### COMMENT—

This section provides for the punishment of those who belong to a gang of persons who make it their business to commit dacoity. Its object is to break up gangs of dacoits by punishing persons associated for the purpose of committing dacoity. The mere fact that women lived as wives or mistresses with men who were dacoits was held not sufficient to prove that they belonged to a gang of persons associated for the purpose of habitually committing dacoity within the meaning of this section, unless it be proved that the women themselves were associated with the husbands or protectors for the purpose of themselves habitually committing dacoities.<sup>250.</sup>

The expression 'belong' implies something more than casual association for the purpose of committing one or two dacoities by a person who was ordinarily living by honest means. It refers to those persons who habitually associate with a gang of dacoits and actively assist them in their operations. But if a person with a bad past record participates in the commission of dacoity even on one occasion in association with a well-known gang of habitual dacoits knowing them to be such a gang, it may be reasonably inferred that he belongs to that gang unless there is some other material on record to justify an inference that the association was of a casual nature.<sup>251.</sup>

The word 'gang' means any band or company of persons who go about together or act in concert. The essence of the word is that the persons should act in concert.<sup>252.</sup> Evidence that persons concerned were associated for the purpose of committing dacoities in a number of cases during a short period of time is good enough evidence to prove association within the meaning of this section even if such evidence was not considered sufficient for conviction under [section 395, IPC, 1860](#), in specific cases.<sup>253.</sup>

<sup>249.</sup> Subs. by Act 26 of 1955, section 117 and Sch, for "transportation for life" (w.e.f. 1 January 1956).

250. *Yella*, (1896) Unrep Cr C 863.
251. *Bhima Shaw*, (1956) Cut 195; *Bai Chaturi*, [AIR 1960 Guj 5](#) [[LNIND 1989 GUJ 36](#)] .
252. *Sharaf Shah Khan*, [AIR 1963 AP 314](#) [[LNIND 1961 AP 52](#)] .
253. *State of Assam v Hetep Boro*, [1972 Cr LJ 1074](#) (Assam).

# THE INDIAN PENAL CODE

## CHAPTER XVII OF OFFENCES AGAINST PROPERTY

### Of Theft

### Of Robbery and Dacoity

#### [s 401] Punishment for belonging to gang of thieves.

Whoever, at any time after the passing of this Act, shall belong to any wandering or other gang of persons associated for the purpose of habitually committing theft or robbery, and not being a gang of thugs or dacoits, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

#### COMMENT—

The principle enunciated in the last section is extended by this section to a gang of thieves or robbers. It is not necessary to prove that each individual member of the gang has habitually committed theft or has committed any particular theft in company with the other members.<sup>254</sup> Even so the word 'belonging' implies something more than mere casual association. It conveys the notion of continuity and more or less continued association of the accused with the gang extending over a considerable length of time which must be proved so as to warrant an inference that the accused identified himself with the gang the common purpose of which was the habitual commission of either theft or robbery.<sup>255</sup>

<sup>254</sup>. *Beja*, (1913) PR No. 13 of 1914.

<sup>255</sup>. *Re Akbar Ali*, 1981 Cr LJ NOC 36 (Mad). Acquittal by lower courts under this section and there being no charge at that time of receiving stolen property under section 410, the Supreme Court did not in an appeal under [Article 136 of the Constitution](#) convict under section 410. *Pandara Nadar v State of TN*, AIR 1991 SC 391 : 1991 Cr LJ 468 . See the comments under section 399.

# THE INDIAN PENAL CODE

## CHAPTER XVII OF OFFENCES AGAINST PROPERTY

### Of Theft

### Of Robbery and Dacoity

**[s 402] Assembling for purpose of committing dacoity.**

**Whoever, at any time after the passing of this Act, shall be one of five or more persons assembled for the purpose of committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.**

### COMMENT—

An unlawful assembly of persons meeting for a common purpose to commit dacoity is subject to the severe punishment provided in this section even though no step is taken in the prosecution of the common object.<sup>256</sup>

<sup>256</sup>. *Bholu*, (1900) 23 All 124 .

# THE INDIAN PENAL CODE

## CHAPTER XVII OF OFFENCES AGAINST PROPERTY

### Of Theft

### Of Criminal Misappropriation of Property

#### [s 403] Dishonest misappropriation of property.

**Whoever dishonestly misappropriates or converts to his own use<sup>1</sup> any movable property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.**

#### ILLUSTRATIONS

- (a) A takes property belonging to Z out of Z's possession, in good faith, believing, at the time when he takes it, that the property belongs to himself. A is not guilty of theft; but if A, after discovering his mistake, dishonestly appropriates the property to his own use, he is guilty of an offence under this section.
- (b) 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. Here, if A was under the impression that he had Z's implied consent to take the book for the purpose of reading it, A has not committed theft. But, if A afterwards sells the book for his own benefit, he is guilty of an offence under this section.
- (c) A and B, being joint owners of a horse, A takes the horse out of B's possession, intending to use it. Here, as A has a right to use the horse, he does not dishonestly misappropriate it. But, if A sells the horse and appropriates the whole proceeds to his own use, he is guilty of an offence under this section.

**Explanation 1.—A dishonest misappropriation for a time only is a misappropriation within the meaning of this section.**

#### ILLUSTRATION

A finds a Government promissory note belonging to Z, bearing a blank endorsement. A, knowing that the note belongs to Z, pledges it with a banker as a security for a loan, intending at a future time to restore it to Z. A has committed an offence under this section.

**Explanation 2.—A person who finds property not in the possession of any other person, and takes such property for the purpose of protecting it for, or of restoring it to, the owner does not take or misappropriate it dishonestly, and is not guilty of an offence; but he is guilty of the offence above defined, if he appropriates it to his own use, when he knows or has the means of discovering the owner, or before he has used reasonable means to discover and give notice to the owner and has kept the property a reasonable time to enable the owner to claim it.**

**What are reasonable means or what is a reasonable time in such a case, is a question of fact.**

**It is not necessary that the finder should know who is the owner of the property, or that any particular person is the owner of it; it is sufficient if, at the time of appropriating it, he does not believe it to be his own property, or in good faith believes that the real owner cannot be found.**

#### ILLUSTRATIONS

- (a) A finds a rupee on the high road, not knowing to whom the rupee belongs. A picks up the rupee. Here A has not committed the offence defined in this section.
- (b) A finds a letter on the road, containing a banknote. From the direction and contents of the letter he learns to whom the note belongs. He appropriates the note. He is guilty of an offence under this section.
- (c) A finds a cheque payable to bearer. He can form no conjecture as to the person who has lost the cheque. But the name of the person, who has drawn the cheque, appears. A knows that this person can direct him to the person in whose favour the cheque was drawn. A appropriates the cheque without attempting to discover the owner. He is guilty of an offence under this section.
- (d) A sees Z drop his purse with money in it. A picks up the purse with the intention of restoring it to Z, but afterwards appropriates it to his own use. A has committed an offence under this section.
- (e) A finds a purse with money, not knowing to whom it belongs; he afterwards discovers that it belongs to Z, and appropriates it to his own use. A is guilty of an offence under this section.
- (f) A finds a valuable ring, not knowing to whom it belongs. A sells it immediately without attempting to discover the owner. A is guilty of an offence under this section.

#### COMMENT—

Criminal misappropriation takes place when the possession has been innocently come by, but where, by a subsequent change of intention, or from the knowledge of some new fact with which the party was not previously acquainted, the retaining becomes wrongful and fraudulent.<sup>257</sup> The offence consists in the dishonest misappropriation or conversion, either permanently or for a time, of property which is already without wrong in the possession of the offender.<sup>258</sup> See illustrations (a), (b) and (c) which show that the original innocent taking amounts to criminal misappropriation by subsequent acts. Illustration (a) is qualified by ill. (b).<sup>259</sup>

#### [s 403.1] Ingredients.—

This section requires—

- (1) Dishonest misappropriation or conversion of property for a person's own use.

(2) Such property must be movable. Section 403 deals with the offence of dishonest misappropriation of property. It provides that "whoever dishonestly misappropriates or converts to his own use any movable property", shall be punished with imprisonment of either description for a term which may extend to two years or with fine or both. The basic requirement for attracting the section is: (i) the movable property in question should belong to a person other than the accused; (ii) the accused should wrongly appropriate or convert such property to his own use; and (iii) there should be dishonest intention on the part of the accused. Here again the basic requirement is that the subject matter of dishonest misappropriation or conversion should be someone else's movable property. When NEPC India owns/possesses the aircraft, it obviously cannot 'misappropriate or convert to its own use' such aircraft or parts thereof. Therefore, section 403 is also not attracted.<sup>260</sup> Section 403 uses the words 'dishonestly' and 'misappropriate'. These are necessary ingredients of an offence under [section 403, IPC, 1860](#).<sup>261</sup>

**1. 'Dishonestly misappropriates or converts to his own use'.—**There must be actual conversion of the thing misappropriated to the accused's own use. Where, therefore, the accused found a thing, and merely retained it in his possession, he was acquitted of this offence.<sup>262</sup> Where the accused found a purse on the pavement of a temple in a crowded gathering and put it in his pocket but was immediately after arrested, it was held that he was not guilty of criminal misappropriation, for it could not be assumed that by the mere act of picking up the purse or putting it in his pocket he intended to appropriate its contents to his own use.<sup>263</sup> Where a person took possession of a bullock which had strayed, but there was no evidence that it was stolen property, and he dishonestly retained it, he could be convicted under this section and not under section 411.<sup>264</sup> The accused purchased for one *anna*, from a child aged six years, two pieces of cloth valued at 15 *annas*, which the child had taken from the house of a third person. It was held that assuming that a charge of dishonest reception of property (section 411) could not be sustained owing to the incapacity of the child to commit an offence, the accused was guilty of criminal misappropriation, if he knew that the property belonged to the child's guardian and dishonestly appropriated it to his own use.<sup>265</sup>

### **[s 403.2] Theft and criminal misappropriation.—**

(1) In theft the offender dishonestly takes property which is in the possession of a person out of that person's possession; and the offence is complete as soon as the offender moves the property. Criminal misappropriation takes place even when the possession has been innocently come by, but where, by a subsequent change of intention or from the knowledge of some new fact, with which the party was not previously acquainted, the retaining becomes wrongful and fraudulent.

(2) The dishonest intention to appropriate the property of another is common to theft and to criminal misappropriation. But this intention, which in theft is sufficiently manifested by a moving of the property, must in criminal misappropriation be carried into action by an actual misappropriation or conversion.

### **[s 403.3] Entrustment of cash.—**

Where a certain amount of cash, which was entrusted to the cashier, was missing from the bank and the money was neither found with the cashier nor at his home, the Court



said that he could be held liable for negligence but not for breach of trust in the absence of proof for misappropriation by him.<sup>266.</sup>

#### **[s 403.4] Joint property.—**

An owner of property, in whichever way he uses his property and with whatever intention, will not be liable for misappropriation and that would be so even if he is not the exclusive owner thereof. A partner has undefined ownership along with the other partners over all the assets of the partnership. If he chooses to use any of them for his own purposes he may be accountable civilly to the other partners. But he does not thereby commit misappropriation.<sup>267.</sup>

#### **[s 403.5] Main contractor receiving payment but not paying to sub-contractor.**

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The principal or main contractor contracted with a sub-contractor for completion of the project. The sub-contractor filed a criminal complaint alleging that the main contractor had received payment under the project but was not paying him. The Supreme Court said that the money paid to the main contractor was not in the nature of money or immovable property of the sub-contractor. Hence, there could be no misappropriation. It was a claim of civil nature.<sup>268.</sup>

#### **[s 403.6] Civil nature.—**

When the dispute in question is purely of civil nature, Magistrate is justified in dismissing the complaint under [section 203 Cr PC, 1973](#).<sup>269.</sup> Merely because a civil claim has been raised by the complainant regarding the breach of agreement, it cannot prevent him from initiating criminal proceedings.<sup>270.</sup>

#### **[s 403.7] Charge under section 406.—Conviction under section 403.—**

[Section 222\(1\) Cr PC, 1973](#) provides when a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it. Sub-section (2) of section 222 provides that when a person is charged with an offence and facts are proved which reduced it to a minor offence, he may be convicted of the minor offence, although he is not charged with it. Offence under section 403 is certainly a minor offence in relation to the offence under [section 406, IPC, 1860](#).<sup>271.</sup>

#### **[s 403.8] Offence partly committed outside India.—**

Indian Courts have jurisdiction against foreigners residing in foreign countries but their acts connected with transaction or part of transaction arising in India. Foreign nationality, their residence outside India, and the fact that they were not present in India when the offence(s) was/were allegedly committed, are of no consequence, in view of

the aforesaid decision rendered by the Supreme Court in *Mobarik Ali Ahmed*<sup>272</sup>.  
case.<sup>273</sup>.

257. *Bhagiram Dome v Abar Dome*, (1988) 15 Cal 388 , 400; *Pramode*, (1965) 2 Cr LJ 562 .
258. *Ramakrishna*, (1888) 12 Mad 49, 50.
259. *Mahadev Govind*, (1930) 32 Bom LR 356 .
260. *Indian Oil Corporation. v NEPC India Ltd.* AIR 2006 SC 2780 [LNIND 2006 SC 537] : (2006) 6 SCC 736 [LNIND 2006 SC 537] ; *Ramaswamy Nadar v The State of Madras*, AIR 1958 SC 56 [LNIND 1957 SC 102] : 1958 Cr LJ 228 ; *Mohammed Ali v State of MP*, 2006 Cr LJ 1368 (MP); *Diamond Cables Ltd v State of Andhra Pradesh*, 2004 Cr LJ 4100 (AP).
261. *Udhar v State*, AIR 2003 SC 974 [LNIND 2003 SC 67] : (2003) 2 SCC 219 [LNIND 2003 SC 67] - Neither of these ingredients are satisfied in the facts and circumstance of this case. It cannot be said that there is any dishonest intention on the part of appellants nor it can be said that TCPL or the appellants have misappropriated or converted the movable property of the complainant to their own use. Since the basic ingredients of the relevant Section in the IPC, 1860 are not satisfied, the order taking cognizance of the offence as well as the issue of summons to the appellants is wholly uncalled for.
262. *Abdool*, (1868) 10 WR (Cr) 23A.
263. *Phuman*, (1907) PR No. 11 of 1908.
264. *Phul Chand Dube*, (1929) 52 All 200 .
265. *Makhulshah v State*, (1886) 1 Weir 470.
266. *State of Maharashtra v Mohan Radhakrishna Pednekar*, 1998 Cr LJ 3771 (Bom).
267. *Velji Raghavji*, (1964) 67 Bom LR 443 (SC). *Mahal Chand Sikwal v State of WB*, 1987 Cr LJ 1569 (Cal).
268. *U Dhar v State of Jharkhand*, AIR 2003 SC 974 [LNIND 2003 SC 67] : 2003 Cr LJ 1224 .
269. *Kaumudiben Harshadbhai Joshi v State of Gujarat*, 2012 Cr LJ 4720 (Guj).
270. *Lee Kun Hee v State of UP*, (2012) 3 SCC 132 [LNIND 2012 SC 89] : AIR 2012 SC 1007 [LNINDORD 2012 SC 443] : 2012 Cr LJ 1551 .
271. *Kundanlal v State of Maharashtra*, 2001 Cr LJ 2288 (Bom).
272. *Mobarik Ali Ahmed*, AIR 1957 SC 857 [LNIND 1957 SC 81] : 1957 Cr LJ 1346 .
273. *Lee Kun Hee v State of UP* (2012) 3 SCC 132 [LNIND 2012 SC 89] : AIR 2012 SC 1007 [LNINDORD 2012 SC 443] : 2012 Cr LJ 1551 .