

265. *Afrahim Sheikh v State of WB*, [AIR 1964 SC 1263](#) [[LNIND 1964 SC 1](#)] : [1964 Cr LJ 350](#) ; *State v Bhimshankar Siddannappa Thobde*, [1968 Cr LJ 898](#) (Bom).

266. *Keshub Mahindra v State of MP*, [\(1996\) 6 SCC 129](#) [[LNIND 1996 SC 2462](#)] : [JT 1996 \(8\) SC 136](#) [[LNIND 1996 SC 2462](#)] [\(1996\) 1 SCC \(Cri\) 1124](#) (Bhopal Gas Tragedy case) against which a curative petition was filed by the CBI and it was dismissed by the [Constitution](#) bench in *CBI v Keshub Mahindra*, [AIR 2011 SC 2037](#) [[LNINDORD 2011 SC 209](#)] : [\(2011\) 6 SCC 216](#) [[LNIND 2011 SC 514](#)] .

THE INDIAN PENAL CODE

CHAPTER II GENERAL EXPLANATIONS

THIS Chapter is for the most part an elaborate interpretation clause. It is a key to the interpretation of the whole Code. The leading terms used are here defined and explained and the meanings thus, announced are steadily adhered to throughout the subsequent chapters.

[s 36] Effect caused partly by act and partly by omission.

Wherever the causing of a certain effect, or an attempt to cause that effect, by an act or by an omission, is an offence, it is to be understood that the causing of that effect partly by an act and partly by an omission is the same offence.

ILLUSTRATION

A intentionally causes Z's death, partly by illegally omitting to give Z food, and partly by beating Z. A has committed murder.

COMMENT—

This section follows as a corollary from section 32. The legal consequences of an 'act' and of an 'omission' being the same, if an offence is committed partly by an act and partly by an omission the consequences will be the same as if the offence was committed by an 'act' or by an 'omission' alone. Fire in the transformer installed in a cinema hall led to multiple deaths but was not the *causa causans* of the tragedy. The absence of rapid dispersal facilities, various acts of omission and commission, violation of rules and bye-laws meant for public safety were other causes which contributed to the tragedy in equal proportion. A charge under this section was held to be justifiable.²⁶⁷

²⁶⁷. *Sushil Ansal v State*, 2002 Cr LJ 1369 . Also see *Association of Victims of Uphaar Tragedy v Gopal Ansal*, (2008) 14 SCC 611 [LNIND 2008 SC 1818] : (2009) 2 SCC (Cr) 878.

THE INDIAN PENAL CODE

CHAPTER II GENERAL EXPLANATIONS

THIS Chapter is for the most part an elaborate interpretation clause. It is a key to the interpretation of the whole Code. The leading terms used are here defined and explained and the meanings thus, announced are steadily adhered to throughout the subsequent chapters.

[s 37] Co-operation by doing one of several acts constituting an offence.

When an offence is committed by means of several acts, whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence.

ILLUSTRATIONS

- (a) A and B agree to murder Z by severally and at different times giving him small doses of poison. A and B administer the poison according to the agreement with intent to murder Z. Z dies from the effects of the several doses of poison so administered to him. Here A and B intentionally co-operate in the commission of murder and as each of them does an act by which the death is caused, they are both guilty of the offence though their acts are separate.
- (b) A and B are joint jailors, and as such have the charge of Z, a prisoner, alternatively for six hours at a time. A and B, intending to cause Z's death, knowingly co-operate in causing that effect by illegally omitting, each during the time of his attendance, to furnish Z with food supplied to them for that purpose, Z dies of hunger. Both A and B are guilty of the murder of Z.
- (c) A, a jailor, has the charge of a prisoner. A, intending to cause Z's death, illegally omits to supply Z with food; in consequence of which Z is much reduced in strength, but the starvation is not sufficient to cause his death. A is dismissed from his office, and B succeeds him. B, without collusion or co-operation with A, illegally omits to supply Z with food, knowing that he is likely thereby to cause Z's death. Z dies of hunger. B is guilty of murder, but, as A did not co-operate with B. A is guilty only of an attempt to commit murder.

COMMENT—

This section follows as a corollary from section 35 as appears from the illustrations. It provides that, when several acts are done so as to result together in the commission of an offence, the doing of any one of them, with an intention to co-operate in the offence (which may not be the same as an intention common to all), makes the actor liable to be punished for the commission of the offence.²⁶⁸ By co-operating in the doing of several acts which together constitute a single **criminal act**, each person who co-operates in the commission of that offence by doing any one of the acts is either singly or jointly liable for that offence.²⁶⁹ If common intention is the hub of section 34, intentional cooperation is the spindle of **section 37 of the Penal Code**. One who shares common intention can as well cooperate in the commission of the offence

intentionally. In that sense the two sections are not contradictory to each other. The former does not necessarily exclude the latter. Co-operation in the commission of the offence need not be for the entire gamut of the offence committed. It is enough if he cooperates in one of the several acts which constitute the offence. Sections 34–38 of the [Penal Code](#) delineate the parameters of constructive or vicarious penal liability in different situations. Therefore, it is not imperative that the charge should contain the particular section of the [Penal Code](#) with which constructive liability is fastened.^{270.}

^{268.} *Barendra Kumar Ghosh*, (1924) 52 IA 40 : 52 Cal 197 : 211, 27 Bom LR 148.

^{269.} *Afrahim Sheikh v State of WB*, AIR 1964 SC 1263 [LNIND 1964 SC 1] : 1964 (6) SCR 172 [LNIND 1964 SC 1] : 1964 Cr LJ 350 .

^{270.} *Justus v State*, 1987 (2) KLT 330 [LNIND 1987 KER 337] : ILR 1988 (1) Ker 98 .

THE INDIAN PENAL CODE

CHAPTER II GENERAL EXPLANATIONS

THIS Chapter is for the most part an elaborate interpretation clause. It is a key to the interpretation of the whole Code. The leading terms used are here defined and explained and the meanings thus, announced are steadily adhered to throughout the subsequent chapters.

[s 38] Persons concerned in criminal act may be guilty of different offences.

Where several persons are engaged or concerned in the commission of a [criminal act](#), they may be guilty of different offences by means of that act.

ILLUSTRATION

A attacks Z under such circumstances of grave provocation that his killing of Z would be only culpable homicide not amounting to murder. B, having ill-will towards Z and intending to kill him, and not having been subject to the provocation, assists A in killing Z. Here, though A and B are both engaged in causing Z's death, B is guilty of murder, and A is guilty only of culpable homicide.

COMMENT—

Section 38 provides that the responsibility for the completed [criminal act](#) may be of different grades according to the share taken by the different accused in the completion of the [criminal act](#) and this section does not mention anything about intention common or otherwise or knowledge.^{271.}

Sections 34–38 lay down principles similar to the English law of 'principals in the first and second degrees.' See Comment on section 107.

The basic principle which runs through sections 32 to 38 is that in certain circumstances an entire act is attributed to a person who may have performed only a fractional part of it. This axiom is laid down in section 34 in which emphasis are on the act. Sections 35–38 take up this axiom as the basis of a further rule by which the criminal liability of the doer of a fractional part (who is to be taken as the doer of the entire act) is to be adjudged in different situations of *mens rea*. Without the axiom itself, however, the other sections would not work, inasmuch as it is the foundation on which they all stand.^{272.}

This section provides for different punishments for different offences as an alternative to one punishment for one offence, whether the persons engaged or concerned in the commission of a [criminal act](#) are set in motion by the one intention or by the other.^{273.} The section applies where a [criminal act](#) jointly done by several persons and the several persons have different intentions or states of knowledge in doing the joint act.^{274.} Where three accused assaulted the deceased but only two used their weapons in a determined manner which clearly showed their common intention to kill the deceased and the third accused who had a *lathi* in his hand did not even use it to cause any injury to the victim, it was held that the former two were liable to be convicted under [section 302](#) read with [section 34, IPC, 1860](#), and the third accused was only liable under section 304, Part II read with [section 38, IPC, 1860](#), as he had intentionally joined the

other two in the commission of the act with the knowledge that the assault was likely to cause death of the deceased even though he did not have the intention to kill him.²⁷⁵.

271. *Afrahim Sheikh v State of WB*, AIR 1964 SC 1263 [LNIND 1964 SC 1] : 1964 (6) SCR 172 [LNIND 1964 SC 1] : 1964 Cr LJ 350 .

272. *Ibra Akanda*, (1944) 2 Cal 405 .

273. *Barendra Kumar Ghosh*, (1924) 52 IA 40 : 52 Cal 197 211 : 27 Bom LR 148.

274. *State v Bhimshankar Siddannappa Thobde*, 1968 Cr LJ 898 (Bom).

275. *Bhaba Nanda v State of Assam*, 1977 Cr LJ 1930 : AIR 1977 SC 2252 [LNIND 1977 SC 291] .
Mano Dutt v State of UP, JT 2012 (2) SC 573 : 2012 (3) Scale 219 [LNIND 2012 SC 160] : (2012) 4 SCC 79 [LNIND 2012 SC 160] .

THE INDIAN PENAL CODE

CHAPTER II GENERAL EXPLANATIONS

THIS Chapter is for the most part an elaborate interpretation clause. It is a key to the interpretation of the whole Code. The leading terms used are here defined and explained and the meanings thus, announced are steadily adhered to throughout the subsequent chapters.

[s 39] "Voluntarily".

A person is said to cause an effect "voluntarily" when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it.

ILLUSTRATION

A sets fire, by night, to an inhabited house in a large town, for the purpose of facilitating a robbery and thus causes the death of a person. Here, A may not have intended to cause death; and may even be sorry that death has been caused by his act; yet, if he knew that he was likely to cause death, he has caused death voluntarily.

COMMENT—

Bare reading of this section shows that a person need not intend to cause a certain effect. If an act is the probable consequence of the means used by him, he is said to have caused it voluntarily whether he really means to cause it or not. Section implicitly lays down the principle that a man is presumed to intend the probable consequences of his act.²⁷⁶ Following this it has been held that if the accused was not aware that the person whom they confined was a public servant, section 332 (voluntarily causing hurt to deter public servant from his duty) would not be attracted. The accused would be guilty of causing hurt under section 323.²⁷⁷ The Supreme Court has given a new meaning to the word "voluntary" by holding in *Olga Tellis v Bombay MC*,²⁷⁸ that the act of slum dwellers putting up their huts on public footpaths and pavements cannot be described to be "voluntary" for the purposes of the definition of "criminal trespass" in section 441, it being the result of utter helplessness and their moral right of survival.

²⁷⁶. *Dr.Meenu Bhatia Prasad v State*, [2002 Cr LJ 1674](#) (Del).

²⁷⁷. *Abdul Majeed v State of Kerala*, [\(1994\) 2 Cr LJ 1404](#) (Ker).

²⁷⁸. *Olga Tellis v. Bombay MC*, [\(1985\) 3 SCC 545 \[LNIND 1985 SC 215\]](#) : 1986 CrLR (SC) 23 : [AIR 1986 SC 180 \[LNIND 1985 SC 215\]](#) .

THE INDIAN PENAL CODE

CHAPTER II GENERAL EXPLANATIONS

THIS Chapter is for the most part an elaborate interpretation clause. It is a key to the interpretation of the whole Code. The leading terms used are here defined and explained and the meanings thus, announced are steadily adhered to throughout the subsequent chapters.

279.[[s 40] "Offence".

Except in the **280.**[Chapters] and sections mentioned in clauses 2 and 3 of this section, the word "offence" denotes a thing made punishable by this Code.

In Chapter IV, **281.**[Chapter VA] and in the following sections, namely, sections **282.**[64, 65, 66, **283.**[67], 71], 109, 110, 112, 114, 115, 116, 117, **284.**[118, 119, 120] 187, 194, 195, 203, 211, 213, 214, 221, 222, 223, 224, 225, 327, 328, 329, 330, 331, 347, 348, 388, 389 and 445, the word "offence" denotes a thing punishable under this Code, or under any special or local law as hereinafter defined.

And in sections 141, 176, 177, 201, 202, 212, 216 and 441, the word "offence" has the same meaning when the thing punishable under the special or local law is punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine.]

COMMENT—

"Offence" means 'an act or instance of offending'; 'commit an illegal act' and illegal means, 'contrary to or forbidden by law'. "Offence" has to be read and understood in the context as it has been prescribed under the provisions of sub-section 40, 41 and 42 IPC, 1860 which cover the offences punishable under IPC, 1860 or under special or local law or as defined under section 2(n) Cr PC, 1973 or section 3(38) of the General Clauses Act 1897. There is no statutory offence that takes place when adults willingly engage in sexual relations outside the marital setting, with the exception of 'adultery' as defined under section 497 IPC, 1860.²⁸⁵ In *Joseph Shine v UOI*²⁸⁶, a five judge Constitution bench of the Supreme Court struck down section 497 of the Indian Penal Code as manifestly discriminatory and arbitrary. Section 2(n) of Cr PC, 1973 defines offence as any act or omission made punishable by any law for the time being in force and includes any act in respect of which a complaint may be under section 20 of the Cattle Trespass Act 1871 (1 of 1871). Thus, the definition of 'offence' under section 2(n), Cr PC, 1973, is wider enough to enable the police to investigate into offences under other enactments also, apart from those under the IPC, 1860.²⁸⁷ An offence seldom consists of a single act. It is usually composed of several elements and, as a rule; a whole series of acts must be proved before it can be established.²⁸⁸ There is a basic difference between the offences under the Penal Code and acts and omissions which have been made punishable under different Acts and statutes which are in nature of social welfare legislations. For framing charges in respect of those acts and omissions, in many cases, *mens rea* is not an essential ingredient; the concerned statute imposes a duty on those who are in charge of the management, to follow the statutory provisions and once there is a breach or contravention, such persons become liable to be punished. But for framing a charge for an offence under the Penal Code, the

traditional rule of existence of *mens rea* is to be followed.²⁸⁹ In the absence of a definition in a special act, the term 'offence' should be understood in the context of [section 40 of the Indian Penal Code](#) as an act that is criminally punishable and [section 3\(38\) of the General Clauses Act](#) as an act made punishable by any law and the essential ingredient is that it should be a [criminal act](#) as understood.²⁹⁰ In *Naz Foundation v NCT Delhi*,²⁹¹ [section 377 of IPC, 1860](#) in so far it criminalised consensual sexual acts of adults in private, was held violative of [Article 21](#), [Article 14](#) and [Article 15 of the Constitution](#) by the Delhi High Court.²⁹² This judgement of the Delhi High Court was later overruled by the Supreme Court on 12 December 2013 in *Suresh Kumar Koushal* case.²⁹³ Finally in *Navtej Singh Johar v UOI*,²⁹⁴ a five-judge bench of the Supreme Court declared [section 377 of the Indian Penal Code](#) unconstitutional, insofar as it criminalises consensual sexual acts of adults of same sex in private. However, other parts of Section 377 relating to sex with minors and bestiality remain in force.

[s 40.1] Offences under Special law.—

A plain reading of this provision of law makes it crystal clear that the effect of clause (2) of section 40 is to make everything punishable under the special law as an offence within the meaning of the [Indian Penal Code](#). The offences under the [NDPS Act](#) thus, become offences under the [Indian Penal Code](#) as the term "offence" in certain cases is extended to the things made punishable under any special or local law.²⁹⁵

[s 40.2] [Article 20\(1\)](#).—

The word 'offence' under [Article 20](#) sub-clause (1) of the [Constitution](#) has not been defined under the [Constitution](#). But [Article 367 of the Constitution](#) states that unless the context otherwise requires, the [General Clauses Act 1897](#) shall apply for the interpretation of the [Constitution](#) as it does for the interpretation of an Act.²⁹⁶

[s 40.3] Offence and breach of duty distinguished.—

Offence generally implies infringement of public, as distinguished from mere private rights punishable under criminal law. When trial for criminal offence is conducted it should be in accordance with proof of the offence as per the evidence defined under the provisions of the [Evidence Act](#). Converse is the case of departmental enquiry. The enquiry in departmental proceedings relates to conduct or breach of duty of the delinquent officer to punish him for his misconduct defined under the relevant statutory rules or law.²⁹⁷

[s 40.4] Suicide.—

Suicide by itself is not an offence under either English or Indian Criminal Law, though at one time it was a felony in England.²⁹⁸

[s 40.5] Euthanasia.—

In India active euthanasia is illegal and a crime under section 302 or at least [section 304 IPC, 1860](#). Physician assisted suicide is a crime under [section 306 IPC, 1860](#) (abetment to suicide).²⁹⁹. But in *Aruna Ramchandra Shanbaug v UOI*,³⁰⁰ the Supreme Court held that passive euthanasia can be allowed under exceptional circumstances under the strict monitoring of the Court. In March 2018, a five-judge [Constitution Bench](#) of the Supreme Court gave legal sanction to passive euthanasia, permitting 'living will' by patients.³⁰¹

[s 40.6] Sections 40 and 141 IPC, 1860.—

Section 40 specifically mentions as to how the term 'offence' will have to be construed. In the main clause of the said section it has been clearly set out that the word "offence" denotes a thing made punishable by this Code except the chapters and sections mentioned in clauses 2 and 3 of the said section. Therefore, going by the main clause of section 40, the word "offence" since denotes the thing made punishable under the Code, 'other offence' mentioned in section 141 'third', can only denote to offences, which are punishable under any of the provisions of the Code. Therefore, by applying the main clause of section 40, it can be straight away held that all offences referred to in any of the provisions of the Code for which the punishment is provided for would automatically fall within the expression "other offence", which has been used in section 141 'third'. Therefore, a conspectus reading of section 40 makes the position abundantly clear that for all offences punishable under the [Indian Penal Code](#), the main clause of section 40 would straight away apply in which event the expression "other offence" used in section 141 'third', will have to be construed as any offence for which punishment is prescribed under the Code. To put it differently, whosoever is proceeded against for any offence punishable under the provisions of the [Indian Penal Code](#), [section 40](#) sub-clause 1 would straight away apply for the purpose of construing what the offence is and when it comes to the question of offence under any other special or local law, the aid of sub-clause 2 and 3 will have to be applied for the purpose of construing the offence for which the accused is proceeded against. Therefore, having regard to sub-clause 1 of section 40 of the Code read along with section 141 'third', the argument of learned senior counsel for the Appellants will have to be rejected. Only such a construction would be in tune with the purport and intent of the law makers while defining an unlawful assembly for commission of an offence with a common object, as specified under section 141 of the Code.³⁰²

²⁷⁹. Subs. by Act 27 of 1870, section 1, for section 40.

²⁸⁰. Subs. by Act 8 of 1930, section 2 and Sch I, for "Chapter".

²⁸¹. Ins. by Act 8 of 1913, section 2.

²⁸². Ins. by Act 8 of 1882, section 1.

²⁸³. Ins. by Act 10 of 1886, section 21(1).

²⁸⁴. Ins. by Act 10 of 2009, section 51(b) (w.e.f. 27-10-2009).

²⁸⁵. *S Khushboo v Kanniammal*, (2010) 5 SCC 600 [LNIND 2010 SC 411] : AIR 2010 SC 3196 [LNIND 2010 SC 411] : (2010) 2 SCC (Cr) 1299; *VijaySingh v State of UP*, (2012) 5 SCC 242 [LNIND 2012 SC 1216] : AIR 2012 SC 2840 [LNINDORD 2012 SC 356] .