

trial after entering the conviction, that question can be taken up for imposing the sentence.²⁶¹ Simply because the provisions of [section 75 of the Indian Penal Code](#) are attracted in a particular case, is no ground for inflicting the extreme punishment provided in that section. The provisions of this section are only permissive and not obligatory. They do confer jurisdiction on the Courts to inflict enhanced punishment but then that jurisdiction is to be exercised in a judicial manner after taking into consideration the circumstances and the factors narrated above.²⁶² [Section 75, IPC, 1860](#) does not prescribe that a severe sentence should be imposed for repetition of any crime by an offender. It does not prescribe a minimum sentence for any event. It does not say that a convict of a petty theft committed without any violence should be given a severe sentence if he had half a dozen previous convictions for like offences to his credit.²⁶³

[s 75.1] Clause (a).—

For the application of this section it is not necessary to show that the previous sentence was for three years or upwards. What is required is that the previous conviction was for an offence punishable under Chapter XII or XVII, for which sentence of imprisonment could have been three years or upwards. The key word being "punishable" the actual sentence awarded for the first offence is not of any consequence so long the offence was punishable with imprisonment for three years or upwards.²⁶⁴ It is also necessary to remember that the conviction for the earlier offence must remain in operation on the date of conviction for second offence. Thus if the previous conviction is set aside on appeal, the accused cannot be awarded enhanced punishment under this section.²⁶⁵ Non-applicability of [section 75, IPC](#) has nothing to do with the proof or guilt of the main offence. If [section 75, IPC](#) is found to be inapplicable then it would not mean that the finding of guilt for certain offences recorded by the Magistrate will also go away. The conviction for the offences would stand and the accused would be liable to be sentenced for the main offence and the sentence cannot be enhanced with the aid of [section 75, IPC, 1860](#).²⁶⁶

[s 75.2] [Section 75](#) and [Section 236](#) of Cr PC.—

Under [section 236 \(310 of old Code\)](#) of the [Code of Criminal Procedure](#) and under [section 75 of the Indian Penal Code](#), it is enough if the person concerned has been earlier convicted. It is not necessary that the sentence should be in force. Bearing in mind that [section 75 of the IPC](#) and [section 236 \(310 of old code\)](#) of the [Code of Criminal Procedure](#) deal with persons with previous conviction and the previous sentence need not necessarily be in force when the subsequent offence is committed—it would be clear that the latter section is intended to be applicable only to cases to which [section 75 of the Indian Penal Code](#) applies.²⁶⁷

²⁵². Subs. by Act 3 of 1910, section 2, for section 75.

²⁵³. The words "British India" have successively been subs. by the A.O. 1948, the A.O. 1950 and Act 3 of 1951, sec. 3 and Sch (w.e.f. 1-4-1951), to read as above.

²⁵⁴. The word "or" omitted by Act 3 of 1951, section 3 and Sch (w.e.f. 1-4-1951).

255. Clause (b) omitted by Act 3 of 1951, section 3 and Sch (w.e.f. 1-4-1951).
256. Subs. by Act 26 of 1955, section 117 and Sch, for "transportation for life" (w.e.f. 1-1-1956).
257. *Re Sugali Nage Naik*, [1965 \(1\) Cr LJ 508](#) .
258. *Manaklal Jhamaklal v State*, [1966 Cr LJ 1139](#) (MP).
259. *Re Kamya*, [AIR 1960 AP 490](#) [[LNIND 1959 AP 115](#)] : [1960 Cr LJ 1302](#) .
260. *Jagdish v State of Rajasthan*, [1991 Cr LJ 2989](#) (Raj).
261. *State v Tampikannu*, [AIR 1970 Ker 251](#) [[LNIND 1969 KER 110](#)] .
262. *Daulat Singh v The State of HP*, [1981 Cr LJ 1347](#) (HP).
263. *Kalarikkal Narayana Panicker Accused v State of Kerala*, [1976 Cr LJ 410](#) .
264. *Ghisulal v State of MP*, [1977 Cr LJ 88](#) (MP).
265. *Dilip Kumar Sharma*, [AIR 1976 SC 133](#) [[LNIND 1975 SC 412](#)] : [1976 Cr LJ 184](#) .
266. *Jagdish v State of Rajasthan*, [1991 Cr LJ 2989](#) (Raj).
267. *Pratap v State of UP*, [AIR 1973 SC 786](#) [[LNIND 1972 SC 595](#)] : (1973) 3 SCC 690 [[LNIND 1972 SC 595](#)] .

THE INDIAN PENAL CODE

CHAPTER III OF PUNISHMENTS

252.[[s 75] Enhanced punishment for certain offences under Chapter XII or Chapter XVII after previous conviction.

Whoever, having been convicted,¹ —

- (a) by a Court in **253.**[India], of an offence punishable under Chapter XII or Chapter XVII of this Code with imprisonment of either description for a term of three years or upwards, **254.**[***]

255. [***]

shall be guilty of any offence punishable under either of those Chapters with like imprisonment for the like term, shall be subject for every such subsequent offence to **256.**[imprisonment for life], or to imprisonment of either description for a term which may extend to ten years.]

COMMENT—

Principle.—This section does not constitute a separate offence but only imposes a liability to enhanced punishment. What [section 75 IPC, 1860](#) contemplates is that where a person who has been, previously convicted of an offence punishable under Chapter XII (which deals with offences relating to coin and Government stamps) or Chapter XVII. (which relates to offences against property) with imprisonment of either description for a term of three years or up-wards, is once again found guilty of a similar offence, he shall be liable to enhanced punishment which may extend to imprisonment for life or to imprisonment of either description for a term which may extend to ten years. The section is concerned with a previous conviction for a similar offence but it does not postulate that in respect of the previous conviction, the punishment imposed should have been one of not less than three years. All that it posits is that the previous conviction should have been in respect of an offence punishable with a term of imprisonment for a term of three years or upwards, but it does not lay down that the offender should have been actually punished with such a term of imprisonment.^{257.} It does not apply to offences under other Acts.^{258.}

1. 'Having been convicted'.—A plain reading of this provision goes to show that the previous conviction ought to be for offence punishable under Chapter XII or Chapter XVII and the sentence imposed is three years or more than that. If the sentence is less than three years or the offence does not fall within any of the two Chapters then [section 75, IPC, 1860](#) would not be applicable. If any authority is required then reference may be made to *Re Kamya*,^{259.} wherein it has been held that the minimum required for enhancement of punishment under [section 75, IPC, 1860](#) is that the previous conviction of the accused should have resulted in punishment of three years or more.^{260.} Section 75 is invoked for enhancement of the sentence and that can come only at the time the sentence is to be imposed. The fact that the accused is an old offender is not to be taken note of by the Court at the trial. Only at the conclusion of the

trial after entering the conviction, that question can be taken up for imposing the sentence.²⁶¹ Simply because the provisions of [section 75 of the Indian Penal Code](#) are attracted in a particular case, is no ground for inflicting the extreme punishment provided in that section. The provisions of this section are only permissive and not obligatory. They do confer jurisdiction on the Courts to inflict enhanced punishment but then that jurisdiction is to be exercised in a judicial manner after taking into consideration the circumstances and the factors narrated above.²⁶² [Section 75, IPC, 1860](#) does not prescribe that a severe sentence should be imposed for repetition of any crime by an offender. It does not prescribe a minimum sentence for any event. It does not say that a convict of a petty theft committed without any violence should be given a severe sentence if he had half a dozen previous convictions for like offences to his credit.²⁶³

[s 75.1] Clause (a).—

For the application of this section it is not necessary to show that the previous sentence was for three years or upwards. What is required is that the previous conviction was for an offence punishable under Chapter XII or XVII, for which sentence of imprisonment could have been three years or upwards. The key word being "punishable" the actual sentence awarded for the first offence is not of any consequence so long the offence was punishable with imprisonment for three years or upwards.²⁶⁴ It is also necessary to remember that the conviction for the earlier offence must remain in operation on the date of conviction for second offence. Thus if the previous conviction is set aside on appeal, the accused cannot be awarded enhanced punishment under this section.²⁶⁵ Non-applicability of [section 75, IPC](#) has nothing to do with the proof or guilt of the main offence. If [section 75, IPC](#) is found to be inapplicable then it would not mean that the finding of guilt for certain offences recorded by the Magistrate will also go away. The conviction for the offences would stand and the accused would be liable to be sentenced for the main offence and the sentence cannot be enhanced with the aid of [section 75, IPC, 1860](#).²⁶⁶

[s 75.2] [Section 75](#) and [Section 236 of Cr PC](#).—

Under [section 236 \(310 of old Code\)](#) of the [Code of Criminal Procedure](#) and under [section 75 of the Indian Penal Code](#), it is enough if the person concerned has been earlier convicted. It is not necessary that the sentence should be in force. Bearing in mind that [section 75 of the IPC](#) and [section 236 \(310 of old code\)](#) of the [Code of Criminal Procedure](#) deal with persons with previous conviction and the previous sentence need not necessarily be in force when the subsequent offence is committed—it would be clear that the latter section is intended to be applicable only to cases to which [section 75 of the Indian Penal Code](#) applies.²⁶⁷

²⁵². Subs. by Act 3 of 1910, section 2, for section 75.

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²⁵⁶. Subs. by Act 26 of 1955, section 117 and Sch, for "transportation for life" (w.e.f. 1-1-1956).

²⁵⁷. *Re Sugali Nage Naik*, 1965 (1) Cr LJ 508 .

258. *Manaklal Jhamaklal v State*, 1966 Cr LJ 1139 (MP).
259. *Re Kamya*, AIR 1960 AP 490 [LNIND 1959 AP 115] : 1960 Cr LJ 1302 .
260. *Jagdish v State of Rajasthan*, 1991 Cr LJ 2989 (Raj).
261. *State v Tampikannu*, AIR 1970 Ker 251 [LNIND 1969 KER 110] .
262. *Daulat Singh v The State of HP*, 1981 Cr LJ 1347 (HP).
263. *Kalarikkal Narayana Panicker Accused v State of Kerala*, 1976 Cr LJ 410 .
264. *Ghisulal v State of MP*, 1977 Cr LJ 88 (MP).
265. *Dilip Kumar Sharma*, AIR 1976 SC 133 [LNIND 1975 SC 412] : 1976 Cr LJ 184 .
266. *Jagdish v State of Rajasthan*, 1991 Cr LJ 2989 (Raj).
267. *Pratap v State of UP*, AIR 1973 SC 786 [LNIND 1972 SC 595] : (1973) 3 SCC 690 [LNIND 1972 SC 595] .

THE INDIAN PENAL CODE

CHAPTER IV GENERAL EXCEPTIONS

THIS chapter has been framed in order to obviate the necessity of repeating in every penal clause a considerable number of limitations.

The word 'offence' in this chapter denotes a thing punishable under the Code or under any special or local law when it satisfied the conditions laid down in section 40 of the Code.

The "general exceptions" contained in sections 76–106 make an offence a non-offence. The "general exceptions" enacted by [Indian Penal Code, 1860 \(IPC, 1860\)](#) are of universal application and for the sake of brevity of expression, instead of repeating in every section that the definition is to be taken subject to the exceptions, the Legislature by [section 6 IPC, 1860](#) enacted that all the definitions must be regarded as subject to the general exceptions. Therefore, general exceptions are part of definition of every offence contained in [IPC, 1860](#), but the burden to prove their existence lied on the accused.¹

The following acts are exempted under the Code from criminal liability:—

1. Act of a person bound by law to do a certain thing (section 76).
2. Act of a Judge acting judicially (section 77).
3. Act done pursuant to an order or a judgment of a Court (section 78).
4. Act of a person justified, or believing himself justified, by law (section 79).
5. Act caused by accident (section 80).
6. Act likely to cause harm done without criminal intent to prevent other harm (section 81).
7. Act of a child under seven years (section 82).
8. Act of a child above seven and under 12 years, but of immature understanding (section 83).
9. Act of a person of unsound mind (section 84).
10. Act of an intoxicated person (section 85) and partially exempted (section 86).
11. Act not known to be likely to cause death or grievous hurt done by consent of the sufferer (section 87).
12. Act not intended to cause death done by consent of sufferer (section 88).
13. Act done in good faith for the benefit of a child or an insane person by or by the consent of guardian (section 89).
14. Act done in good faith for the benefit of a person without consent (section 92).
15. Communication made in good faith to a person for his benefit (section 93).
16. Act done under threat of death (section 94).
17. Act causing slight harm (section 95).

18. Act done in private defence (sections 96–106).

The above exceptions, strictly speaking, come within the following seven categories:—

1. Judicial acts (section. 77, 78).
2. Mistake of fact (sections 76, 79).
3. Accident (section 80).
4. Absence of criminal intent (sections 81–86, 92–94).
5. Consent (sections 87, 90).
6. Trifling acts (section 95).
7. Private defence (sections 96–106).

Onus of proving exception lies on accused.—When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the [Penal Code](#), or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.²

Although the law lays down that the onus of proving circumstances which give the benefit of a general exception to an accused person lies on him, and in the absence of evidence the presumption is against the accused, this does not mean that the accused must lead evidence. If it is apparent from the evidence on the record, whether produced by the prosecution or by the defence, that a general exception would apply, then the presumption is removed and it is open to the Court to consider whether the evidence proves to its satisfaction that the accused comes within the exception.³

Applicability of General exceptions during investigation.—In considering that whether accusation made in the complaint makes out a case for commission of offence or not, the police while reaching the *prima facie* satisfaction of suspecting the commission of cognizable offence, cannot ignore the general exception as provided under [IPC, 1860](#) as per Chapter IV of [IPC, 1860](#). If on the basis of the allegation made in the complaint, the case is falling in general exceptions, it can be said that the action cannot be termed as an offence.⁴ Investigating officer is bound to investigate and confirm that despite what is contained in the "General Exceptions"; acts committed by accused shall constitute offence under [IPC, 1860](#). This shall be done, by virtue of [section 6 of IPC, 1860](#). In the light of [section 6 of IPC, 1860](#), definition of every offence is to be understood subject to the "General Exceptions". Therefore, investigation shall not confine merely to the acts committed by a person. Depending on facts and circumstances of each case, many other relevant facts also have to be investigated into, in the light of the provisions contained in "General Exceptions". It is only then that an investigating officer will be able to confirm whether the act committed by a person is an offence or not, as defined in [IPC, 1860](#) subject to what is contained in "General Exceptions". Further, the category of self-defence falling in general exception would fall in a different category than the general exceptions, which are provided in the very chapter for exercise of the statutory duty or lawful power either under the mistake of law or fact or mistaken belief of law or fact.⁵

[s 76] Act done by a person bound, or by mistake of fact believing himself bound, by law.

Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact ¹ and not by reason of a mistake of law ² in good faith believes himself to be,

bound by law³ to do it.

ILLUSTRATIONS

- (a) A, a soldier, fires on a mob by the order of his superior officer, in conformity with the commands of the law. A has committed no offence.
- (b) A, an officer of a Court of Justice, being ordered by that Court to arrest Y, and, after due enquiry, believing Z to be Y, arrests Z. A has committed no offence.

COMMENT.—

Sections 76 and 79 are based on the maxim *ignorantia facti doth excusat* and *ignorantia juris non excusat*. Section 76 excuses a person who has done what by law is an offence, under a misconception of facts, leading him to believe in good faith that he was commanded by law to do it. See Comment on section 79, *infra*.

This section and sections 77, 78 and 79 deal with acts of a person bound or justified by law. This section as well as sections 78 and 79 deal with acts of a person under a mistake.

1. 'Mistake of fact'.—See Comment under section 79, *infra*.

2. 'Mistake of law'.—See Comment under section 79, *infra*.

3. 'In good faith believes himself to be, bound by law'.—In order to entitle a person to claim the benefit of this section it is necessary to show the existence of a state of facts which would justify the belief in good faith, interpreting the latter expression with reference to section 52, that the person to whom the order was given was bound by law to obey it. Thus, in the case of a soldier, the [Penal Code](#) does not recognize the mere duty of blind obedience to the commands of a superior as sufficient to protect him from the penal consequences of his act. But in certain circumstances a soldier receives absolute protection under [section 132 of the Cr PC, 1973](#).

For illegal acts, however, neither the orders of a parent nor a master nor a superior will furnish any defence. Nothing but fear of instant death is a defence for a policeman who tortures anyone by order of a superior. The maxim *respondeat superior* has no application to such a case.⁶ The net position appears to be that if superior order is in conformity with the law no further question arises and the subordinate officer is protected by [section 76 IPC, 1860](#), if he carries out that order. It is only when the order is not in accordance with the law but the subordinate officer who carries out that order in good faith, on account of a mistake of fact and not on ground of mistake of law, believes himself to be bound by law to carry out such an order, that a further question arises as to whether the subordinate officer will not still get protection of [section 76 IPC, 1860](#), because of his mistake of fact. Thus, where the order was legal in the circumstances of the case, e.g., where the police patrol party opened fire under the order of the Deputy Commissioner of Police after it had been attacked on a dark night and an Assistant Commissioner of Police had been injured as a result of such attack, really no question arose for the application of [section 76 IPC, 1860](#), as the order was both legal and justified by the circumstances of the case.⁷ The Indian law as contained in [sections 76 and 79](#) of the [Penal Code](#) appears to be the same as in England. This point has, however, not been clearly decided in any case including the decision of the Supreme Court in *Shew Mangal Singh's case*.⁸ There are, however, enough indications

in *Shew Mangal Singh's* case and in [sections 76 and 79 IPC, 1860](#), that if the subordinate due to a mistake of fact and not due to a mistake of law honestly believed that he was bound or justified by law in carrying out the superior order which though not manifestly illegal was nevertheless illegal, perhaps he would still get the benefit of superior order. Obedience to an illegal order can only be used in mitigation of punishment but cannot be used as a complete defence.⁹ If on account of any abnormal reaction, the employee has committed suicide, the conduct of the complainant or of higher officer of taking departmental action by way of resorting to legal remedy or enforcement of law, cannot be termed as leaving no option to the delinquent employee but to commit suicide and, therefore, cannot be said as abetment or incitement to suicide under such circumstances. In any case any action for resorting to legal remedy for grievances or for enforcement of law in exercise of powers or purported exercise of power cannot be said to contain any element of criminality unless such action is *ex facie* without any competence, authority or jurisdiction.¹⁰

[s 76.1] Protection of private persons assisting police.—

Private persons who are bound to assist the police under [section 42 of the Cr PC, 1973](#) will be protected under this section.

1. *Shankar Narayan Bhadolkar v State of Maharashtra*, [AIR 2004 SC 1966](#) [[LNIND 2004 SC 1370](#)] : [2004 Cr LJ 1778](#) : (2005) 9 SCC 71 [[LNIND 2004 SC 1370](#)] .
2. The [Indian Evidence Act](#), I of 1872, section 105.
3. *Musammat Anandi*, (1923) 45 All 329 ; *Babulal*, [1960 Cr LJ 437](#) (All).
4. *A K Chaudhary v State of Gujarat*, [2006 Cr LJ 726](#) (Guj).
5. *A K Chaudhary v State of Gujarat*, [2006 Cr LJ 726](#) (Guj).
6. *Latifkhan v State*, (1895) 20 Bom 394; *Gurdit Singh*, (1883) PR No. 16 of 1883.
7. *State of WB v Shew Mangal Singh*, [1981 Cr LJ 1683](#) : [AIR 1981 SC 1917](#) [[LNIND 1981 SC 355](#)] : (1981) 4 SCC 2 [[LNIND 1981 SC 355](#)] .
8. *Shew Mangal Singh*, *Supra*.
9. *Chaman Lal*, (1940) 21 Lah 521.
10. *A K Chaudhary v State of Gujarat*, [2006 Cr LJ 726](#) (Guj).

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