

### **[s 109.3] Failure to prevent is not abetment.—**

It has been held by the Supreme Court that a failure to prevent the commission of an offence is not an abetment of that offence. The Court said:

Where a person aids and abets the perpetrator of a crime at the very time when the crime is committed, he is a principal of the second degree and section 109 applies. But mere failure to prevent the commission of an offence is not by itself an abetment of that offence. Considering the definition in section 109 strictly, the instigation must have reference to the thing that was done and not to the thing that was likely to have been done by the person who is instigated. It is only if this condition is fulfilled that a person can be guilty of abetment by instigation. Section 109 is attracted even if the abettor is not present when the offence abetted is committed provided that he had instigated the commission of the offence or had engaged with one or more other persons in a conspiracy to commit an offence and pursuant to the conspiracy some act or illegal omission takes place or intentionally induced the commission of an offence by an act or illegal omission. In the absence of direct involvement, conviction for abetment is not sustainable. Section 109 provides that if the act abetted is committed in consequence of abetment and there is no provision for the punishment of such abetment then the offender is to be punished with the punishment provided for the original offence. Section 109 applies even where the abettor is not present. Active abetment at the time of committing the offence is covered by section 109.

The words 'act abetted' as used in section 109 means the specific offence abetted. Mere help in the preparation for the commission of an offence which is not ultimately committed is not abetment within the meaning of section 109. 'Any offence' in section 109 means offence punishable under IPC or any special or local law. The abetment of an offence under the special or local law, therefore, is punishable under section 109. For constituting offence of abetment, intentional and active participation by the abettor is necessary.<sup>84.</sup>

When a person is charged with the abetment of an offence, it is normally linked with an offence which has been proved.<sup>85.</sup>

### **[s 109.4] Procedure.—Failure to frame Charge.—**

Section 109, IPC, 1860 is a distinct offence. Accused having faced trial for being a member of an unlawful assembly which achieved the common object of killing the deceased, could in no event be substitutedly convicted for offence under section 302, IPC, 1860 with the aid of section 109, IPC, 1860. There was obviously thus, not only a legal flaw but also a great prejudice to the appellant in projecting his defence.<sup>86.</sup> Section 109, IPC, 1860 is by itself an offence though punishable in the context of other offences.<sup>87.</sup>

### **[s 109.5] Sentence.—**

When the act abetted is committed as a consequence of abetment, the abettor should be punished with the punishment provided for the main offence with the help of section 109, IPC, 1860 and even if a charge under section 120B, IPC, 1860 had been framed, no separate sentence under that section is called for.<sup>88.</sup> No distinction should be made in the quantum of sentence to be awarded to the principal offender and that awarded to the abettor.<sup>89.</sup>

### **[s 109.6] Compoundable.—**

When an offence is compoundable under section 320 of the Cr PC, 1973, the abetment of such may be compounded in like manner.<sup>90.</sup>

## [s 109.7] CASES.—

Where the accused instigated others to assault with deadly weapons and not to kill, he should be convicted under [section 324](#) read with [section 109, IPC, 1860](#) and not under [section 307](#) read with [section 109, IPC, 1860](#).<sup>91</sup> Where the accused did not participate in the act of rape but kept watch while others were committing the offence, and thereby aided and abetted the commission of the crime instead of preventing it, he was held liable to be convicted under section 376 read with this section and not under section 376 read with section 34.<sup>92</sup>

## [s 109.8] Distinction between sections 109 and 114.—

There is a distinction between section 109 and section 114. Section 114 applies where a criminal first abets an offence to be committed by another person, and is subsequently present at its commission. Active abetment at the time of committing the offence is covered by section 109 and section 114 is clearly intended for an abetment previous to the actual commission of the crime, that is, before the first steps have been taken to commit it.<sup>93</sup>

76. *NMMY Momin*, 1971 Cr LJ 793 : AIR 1971 SC 885 [LNIND 1970 SC 155] . Where the accused suffered trial for the substantive offences of causing hurt under sections 328 and 272 by mixing ethyl and methyl alcohol but his direct involvement was not established, section 109 was not permitted to be pushed into service for convicting him for abetment; *Joseph v State of Kerala*, AIR 1994 SC 34 : 1994 Cr LJ 21 : 1995 SCC (Cr) 165.

77. *Arjun Singh v State of HP*, AIR 2009 SC 1568 [LNIND 2009 SC 252] : (2009) 4 SCC 18 [LNIND 2009 SC 252] : (2009) 1 SCR 983 [LNIND 2009 SC 252] : 2009 (2) Scale 302 [LNIND 2009 SC 252] : 2009 Cr LJ 1332 . See *Kehar Singh v The State (Delhi Admn.)*, AIR 1988 SC 1883 [LNIND 1988 SC 887] ; *Kulwant Singh v State of Bihar*, (2007) 15 SCC 670 [LNIND 2007 SC 820] .

78. *Amit Kapoor v Ramesh Chander*, JT 2012 (9) SC 312 [LNIND 2012 SC 564] : 2012 (9) Scale 58 [LNIND 2012 SC 564] : (2012) 9 SCC 460 [LNIND 2012 SC 564] .

79. *Ashok Nivruti Desai v State of Maharashtra*, 1995 Cr LJ 826 (Bom). *Jag Narain Prasad v State of Bihar*, 1998 Cr LJ 2553 : AIR 1998 SC 2879 [LNIND 1998 SC 387] , the accused charged with exhorting his son to kill the victim. The court said that it was not believable that an aged person would involve his son into crime for a trivial reason. Mere presence at the spot is not sufficient to involve all the family members who were there. See also *Manjula v Muni*, 1998 Cr LJ 1476 (Mad).

80. *Wakil Yadav v State of Bihar*, 1999 Cr LJ 5000 (SC). *Arjun Singh v State of HP*, (2009) 4 SCC 18 [LNIND 2009 SC 252] : AIR 2009 SC 1568 [LNIND 2009 SC 252] : 2009 Cr LJ 1332 , ingredients restated, the offence was not made out in this case.

81. *Amit Kapoor v Ramesh Chander*, JT 2012 (9) SC 312 [LNIND 2012 SC 564] : 2012 (9) Scale 58 [LNIND 2012 SC 564] : (2012) 9 SCC 460 [LNIND 2012 SC 564] ; *Kishangiri Mangalgiri Swami v State of Gujarat*, 2009 (4) SCC 52 [LNIND 2009 SC 193] .

82. *Jasobant Narayan Mohapatra v State of Orissa*, 2009 Cr LJ 1043 (Ori).

83. *Om Prakash v State of Haryana*, [2015 Cr LJ 586](#) : (2015) 2 SCC 84 [LNIND 2014 SC 887] .
84. *Kulwant Singh v State of Punjab*, [\(2007\) 15 SCC 670](#) [LNIND 2007 SC 820] .
85. *Goura Venkata Reddy v State of AP*, [\(2003\) 12 SCC 469](#) [LNIND 2003 SC 1004] , the appellant (accused) who instigated the other accused was convicted under section 304/109 and not under section 302/109.
86. *Wakil Yadav v State of Bihar*, [\(2000\) 10 SCC 500](#) : 1999 AIR SCW 4694.
87. *Joseph Kurian Philip Jose v State*, [\(1994\) 6 SCC 535](#) [LNIND 1994 SC 927] : AIR 1995 SC 4 [LNIND 1994 SC 927] : [1995 Cr LJ 502](#) .
88. *State of TN v Savithri*, [1976 Cr LJ 37](#) (Mad).
89. *Ashok Nivruti Desai v State of Maharashtra*, [\(1995\) 1 Cr LJ 826](#) (Bom). *Vinit v State of Maharashtra*, [\(1994\) 2 Cr LJ 1791](#) (Bom).
90. [Section 320\(3\) Code of Criminal Procedure, 1973](#).
91. *Jai Narain*, [1972 Cr LJ 469](#) : AIR 1972 SC 1764 .
92. *Nawabkhan v State of MP*, [1990 Cr LJ 1179](#) MP; *Jai Chand v State of HP*, [2002 Cr LJ 2301](#) (HP); *Munuswamy v State of TN*, [2002 Cr LJ 3916](#) (SC) : AIR 2002 SC 2994 [LNIND 2002 SC 500] .
93. *Kulwant Singh v State of Bihar*, [\(2007\) 15 SCC 670](#) [LNIND 2007 SC 820] ; *Mathurala Adi Reddy v State of Hyderabad*, [AIR 1956 SC 177](#) : [1956 Cr LJ 341](#) .

# THE INDIAN PENAL CODE

## CHAPTER V OF ABETMENT

**[s 110] Punishment of abetment if person abetted does act with different intention from that of abettor.**

**Whoever abets the commission of an offence shall, if the person abetted does the act with a different intention or knowledge from that of the abettor, be punished with the punishment provided for the offence which would have been committed if the act had been done with the intention or knowledge of the abettor and with no other.**

### **COMMENTS.—**

This section provides that though the person abetted commits the offence with a different intention or knowledge yet the abettor will be punished with the punishment provided for the offence abetted. The liability of the person abetted is not affected by this section.

Explanation 3 to section 108 should be read in conjunction with this section. See illustration (d) to that section.

# THE INDIAN PENAL CODE

## CHAPTER V OF ABETMENT

### [s 111] Liability of abettor when one act abetted and different act done.

**When an act is abetted and a different act is done, the abettor is liable for the act done, in the same manner and to the same extent as if he had directly abetted it:**

**Proviso.**

***Provided the act done was a probable consequence of the abetment, and was committed under the influence of the instigation, or with the aid or in pursuance of the conspiracy which constituted the abetment.***

#### ILLUSTRATIONS

- (a) A instigates a child to put poison into the food of Z, and gives him poison for that purpose. The child, in consequence of the instigation, by mistake puts the poison into the food of Y, which is by the side of that of Z. Here, if the child was acting under the influence of A's instigation, and the act done was under the circumstances a probable consequence of the abetment, A is liable in the same manner and to the same extent as if he had instigated the child to put the poison into the food of Y.
- (b) A instigates B to burn Z's house. B sets fire to the house and at the same time commits theft of property there. A, though guilty of abetting the burning of the house, is not guilty of abetting the theft; for the theft was a distinct act, and not a probable consequence of the burning.
- (c) A instigates B and C to break into an inhabited house at midnight for the purpose of robbery, and provides them with arms for that purpose. B and C break into the house, and being resisted by Z, one of the inmates, murder Z. Here, if that murder was the probable consequence of the abetment, A is liable to the punishment provided for murder.

#### COMMENTS.—

**Liability of abettor when different act done.**—This section proceeds on the maxim "every man is presumed to intend the natural consequences of his act". If one man instigates another to perpetrate a particular crime, and that other, in pursuance of such instigation, not only perpetrates that crime, but, in the course of doing so, commits another crime in furtherance of it, the former is criminally responsible as an abettor in respect of such last-mentioned crime, if it is one which, as a reasonable man, he must, at the time of the instigation, have known would, in the ordinary course of things, probably have to be committed in order to carry out the original crime. B and C instigated A to rob the deceased on his return to home after receiving a sum of money; whereupon A killed the deceased. A was convicted of murder and B and C of offences under sections 109, 302.<sup>94</sup> Where the act contemplated and instigated was no more than a thrashing with a *lathi*, but one of the assailants suddenly took out a spearhead

from his pocket and fatally stabbed the person who was to be thrashed, the others were not held liable for murder or abetment of murder.<sup>95</sup>

94. *Mathura Das*, (1884) 6 All 491 , 494.

95. *Girja Prasad*, (1934) 57 All 717 .

## THE INDIAN PENAL CODE

### CHAPTER V OF ABETMENT

**[s 112] Abettor when liable to cumulative punishment for act abetted and for act done.**

**If the act for which the abettor is liable under the last preceding section is committed in addition to the act abetted, and constitutes a distinct offence, the abettor is liable to punishment for each of the offences.**

#### ILLUSTRATION

A instigates B to resist by force a distress made by a public servant. B, in consequence, resists that distress. In offering the resistance, B voluntarily causes grievous hurt to the officer executing the distress. As B has committed both the offences of resisting the distress, and the offence of voluntarily causing grievous hurt, B is liable to punishment for both these offences; and, if A knew that B was likely voluntarily to cause grievous hurt in resisting the distress A will also be liable to punishment for each of the offences.

#### COMMENTS.—

This section extends the principle enunciated in the preceding section. Under it the abettor is punished for the offence abetted as well as the offence committed. A joint reading of sections 111, 112 and 133 make it abundantly clear that if a person abets another in the commission of an offence and the principal goes further thereafter and does something more which has a different result from that intended by the abettor and makes the offence an aggravated one, the abettor is liable for the consequences of the acts of his principal. The crux of the problem in an enquiry of this sort is whether the abettor as reasonable man at the time of his instigation or intentionally aiding the principal would have foreseen the probable consequences of his abetment.<sup>96.</sup>

<sup>96.</sup> *Re Irala Palle Ramiah*, 1957 Cr LJ 815 (AP).

## **THE INDIAN PENAL CODE**

### **CHAPTER V OF ABETMENT**

**[s 113] Liability of abettor for an effect caused by the act abetted different from that intended by the abettor.**

**When an act is abetted with the intention on the part of the abettor of causing a particular effect, and an act for which the abettor is liable in consequence of the abetment, caused a different effect from that intended by the abettor, the abettor is liable for the effect caused, in the same manner and to the same extent as if he had abetted the act with the intention of causing that effect, provided he knew that the act abetted was likely to cause that effect.**

#### **ILLUSTRATION**

A instigates B to cause grievous hurt to Z. B, in consequence of the instigation causes grievous hurt to Z. Z dies in consequence. Here, if A knew that the grievous hurt abetted was likely to cause death, A is liable to be punished with the punishment provided for murder.

#### **COMMENTS.—**

This section should be read in conjunction with section 111. Section 111 provides for the doing of an act different from the one abetted, whereas this section deals with the case when the act done is the same as the act abetted but its effect is different.



# THE INDIAN PENAL CODE

## CHAPTER V OF ABETMENT

### [s 114] Abettor present when offence is committed.

**Whenever any person who if absent would be liable to be punished as an abettor, is present when the act or offence for which he would be punishable in consequence of the abetment is committed, he shall be deemed to have committed such act or offence.**

### COMMENTS.—

This section:

is only brought into operation when circumstances amounting to abetment of a particular crime have first been proved, and then the presence of the accused at the commission of that crime is proved in addition ... Section 114 deals with the case, where there has been the crime of abetment, but where also there has been actual commission of the crime abetted and the abettor has been present thereat, and the way in which it deals with such a case is this. Instead of the crime being still abetment with circumstances of aggravation, the crime becomes the very crime abetted. The section is evidently not punitory. Because participation *de facto*. ... may sometimes be obscure in detail, it is established by the presumption *Juris et de jure* that actual presence plus prior abetment can mean nothing else but participation. The presumption raised by s. 114 brings the case within the ambit of s. 34.<sup>97.</sup>

The meaning of this section is that if the nature of the act done constitutes abetment, then, if present, the abettor is to be deemed to have committed the offence, though in point of fact another actually committed it. The abetment must be complete apart from the mere presence of the abettor.<sup>98.</sup> The words "who if absent would be liable to be punished as an abettor" clearly show that abetment must be one prior to the commission of the offence and complete by itself.<sup>99.</sup> Where, for instance, a blow is struck by A, in the presence of, and by the order of, B, both are principals in the transaction. If A instigates B to murder, he commits abetment; if absent, he is punishable as an abettor, and if the offence is committed, then under section 109; if present, he is by this section deemed to have committed the offence and is punishable as a principal. This section applies to cases where a person abets the commission of the offence sometime before at a different place and also remains present at the time the offence is committed.<sup>100.</sup> But where a person is charged with abetment under this section for aiding in the Commission of an offence, e.g., [section 300 IPC, 1860](#) and the person charged as the principal offender is acquitted on the ground that he had not committed the offence in question, no further question arises regarding abettor's liability.<sup>101.</sup>

Section 114 is not applicable in every case in which the abettor is present at the commission of the offence abetted. While section 109 is a section dealing generally with abetment, section 114 applies to those cases only in which not only is the abettor present at the time of the commission of the offence but abetment has been committed prior to and independently of his presence.<sup>102.</sup>

### [s 114.1] Sections 34 and 114.—

The distinction between sections 34 and 114 is a very fine one. According to section 34, where a [criminal act](#) is done by several persons, in furtherance of the common intention of all, each of them is liable as if it were done by himself alone; so that if two or more persons are present, aiding and abetting in the commission of a murder each will be tried and convicted as a principal, though it might not be proved which of them actually committed the act. Section 114 refers to the case where a person by abetment, previous to the commission of the act, renders himself liable as an abettor, is present when the act is committed, but takes no active part in the doing of it.<sup>103</sup> A mere direction from one person to another and the carrying out of that direction by the other may be only instigation of the latter's act and may not be a case of a joint act falling under section 34.<sup>104</sup> Accused provided an axe to his son who assaulted the victim leading to his death. It was not a pre-meditated action on the part of main accused and appellant supplied axe instantaneously without considering its pros and cons. Conviction of appellant on charge of abetment (section 114) is not maintainable.<sup>105</sup>

**1. 'Present'.—**It is not necessary that the party should be actually present, an ear or eye witness of the transaction; he is, in construction of law, present, aiding and abetting, if, with the intention of giving assistance, he be near enough to afford it, should occasion arise. A conspirator, who, while his friends enter into a house and loot it, stands and watches outside in pursuance of the common design, does not escape liability under the section.<sup>106</sup> Where, therefore, a person watched at the door of a house while a murder was being committed inside he would be guilty of murder.<sup>107</sup>

#### **[s 114.2] Section 376 read with Section 114.—**

In order to bring home such conviction under [section 376, IPC, 1860](#) read with [section 114, IPC, 1860](#) there must be evidence on record to show: (a) that there was abetment of rape to be committed; (b) that the abettors have factually abetted the commission of rape; and (c) that they were present at the time when the commission of rape took place.<sup>108</sup>

<sup>97</sup>. *Barendra Kumar Ghosh*, (1924) 52 IA 40, 53 : 27 Bom LR 148, 159 : 52 Cal 197.

<sup>98</sup>. *Krishnaswami Naidu*, (1927) 51 Mad 263. See *Malanrama v State of Maharashtra*, ILR 1958 Bom 700 [LNIND 1957 BOM 189] : 1960 Cr LJ 1189 where it was held in the circumstances of the case that the mere presence of the accused at the ceremony knowing that the offence of bigamy was being committed and the throwing the holy rice over the couple did not amount to abetment of bigamy notwithstanding that one of the accused persons distributed pan after the ceremony. Followed in *CS Vardachari v CS Shanti*, 1987 Cr LJ 1048 over similar facts.

<sup>99</sup>. *Sital*, (1935) 11 Luck 384.

<sup>100</sup>. *Nanboo v Kedar*, AIR 1962 MP 91 [LNIND 1961 MP 109].

<sup>101</sup>. *Mahommed Jasimuddin*, 1982 Cr LJ 1510 (Gau). See also *State v Naroshbhai Haribhai Tandel*, 1997 Cr LJ 2783 (Guj).

<sup>102</sup>. *Kulwant Singh v State of Bihar*, (2007) 15 SCC 670 [LNIND 2007 SC 820].

<sup>103</sup>. *Jan Mahomed*, (1864) 1 WR (Cr) 49; *Nga Po Kyone*, (1933) 11 Ran 354.