[CRIMINAL TRIAL] FROM "TAKING COGNIZANCE" TO "FRAMING OF CHARGES"

INTRODUCTION

The curial act of *"taking cognizance of an offence"* has baffled the Bench and the Bar alike mainly due to the fact that the Code of Criminal Procedure, 1973 ("Cr.P.C." for short) has not chosen to define the said expression although we find the said expression used in various provisions in the Cr.P.C. such as Sections 169, 170, 173, 186, 190 to 193, 195 to 198, 198-A, 198-B, 199 to 202, 204, 237, 265-A, 306, 309, 343, 460, 461, 468 etc. An apt definition of the said complex phenomenon is also difficult. Even though judicial pronouncements on the process of taking cognizance of an offence are legion, some of them have presented problems in the dispensation of justice. We have come across loose expressions such as *"the Magistrate applies his mind to the suspected commission of the offence" (2004) 4 SCC 432; (2004) 11 SCC 622; "the Magistrate taking notice of the accusations and applying his mind to the allegations" (1993) 2 SCC 16, "the Magistrate judicially applying his mind to the facts with a view to taking further action" (1977) 4 SCC 459,* "*the Magistrate becoming aware of the offence"* or "*Magistrate taking judicial notice of an offence" (1995) 1 SCC 684; (2011) 3 SCC 496; (2012) 2 SCC 188),* or *"the Magistrate taking notice of the complaint or the FIR or the information that an offence has been committed" (2012) 10 SCC 517;* "*the Magistrate recording the sworn statement of the complainant and the witnesses"* or "*the Magistrate issuing process to the accused"* and so on and so forth. A judicial functionary and a legal practitioner on the criminal side cannot afford

to remain blissfully ignorant of the curial act of taking cognizance of an offence and its legal implications.

Equally important is the curial act of discharging the accused or framing a charge against him. There is confusing case-law on this aspect. In warrant and sessions trial, all that the Court need consider **for framing a charge** is whether there is "*sufficient ground for presuming that the accused has committed an offence".* Likewise for discharging an accused in Sessions trial the only question germane for consideration is whether there is "*sufficient ground for proceeding against the accused".* In warrant trial, for discharging the accused, the Court need consider "*whether the charge against the accused is groundless".* These statutory yardsticks have been unnecessarily complicated through judicial pronouncements with the result that we have conflicting judgments on almost all the above yardsticks.

SOURCES OF TAKING COGNIZANCE OF AN OFFENCE

2. Before delving deep into the mechanics of the process of taking cognizance of an offence it is relevant to note "the *sources of taking cognizance*".

Q.1 Which are the sources of taking cognizance of an offence?

Section 190 (1) Cr.P.C. enumerates the different sources on which a Magistrate is empowered to take cognizance of any offence.
They are:-

Sec.190

	a	**Upon receiving a complaint of facts constituting the offence.** *(such a complaint is defined under Sec 2(d) Cr.P.C.)*
	b	**Upon a police report** *(as defined under Section 2 I Cr.P.C.)* **of such facts.**
	C (i)	**Upon information from a non-police officer.** *(such as an accused person voicing a grievance of assault or torture by the Police, information from the media or internet etc).*
	(ii)	**Upon the own knowledge of the Magistrate.** *(Where an offence is committed right in the presence of a Magistrate).*

In actual practice, the main sources are ***"Police Report"*** *and "****Complaint".***

Q.2 What is the distinction between *cognizable* and *non-cognizable* offences?

COGNIZABLE AND NON-COGNIZABLE OFFENCES

3. *What is a "cognizable offence"? The expression "****cognizable offence****" has been defined under Section 2(c) Cr.P.C as follows:-*

> ***"(c) "Cognizable offence" means an offence for which and "cognizable case" means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant."***

*In contradistinction to the above, Section 2 (l) Cr.P.C. defines a "****non-cognizable offence"*** *as follows:-*

> ***"(l) "Non-cognizable offence" means an offence for which, and "non-cognizable case" means a case in which, a Police Officer has no authority to arrest without warrant".***

While cognizable offences are relatively graver offences, non-cognizable offences are not so grave and this justifies the fact that a Police Officer

is enabled to arrest without a warrant an offender committing a cognizable offence only. To find out whether an offence under the IPC is "cognizable" or "non-cognizable" one has to ascertain the same from Column 4 of the table given in Part-I of the First Schedule to the Cr.P.C. showing the "Classification of Offences". Part-II of that table deals with offences under other laws. If the offence is punishable with imprisonment for 3 years and above it is cognizable and if less than 3 years, it is non-cognizable.

POLICE REPORT AND PRIVATE COMPLAINT

4. **"***Police report*" and "*private complaint*" are the two main sources for taking cognizance of offences by a Magistrate.

Police Report.

Q.3 What is a "*police report*" and when does it become a source for taking cognizance of an offence?

Ans. *Where a complaint has been lodged before the officer-in-charge of a Police station ("SHO" for short) alleging the commission of a* ***cognizable offence****, he has the jurisdiction to register a crime and commence investigation in view of Section 154 read with Section 156 Cr.P.C. The said complaint is not to be mistaken for a "complaint" as defined under Section 2 (d) Cr.P.C. which is the "private complaint" filed before a Magistrate and not before the Police. When it is said that a complaint has been lodged before the Police, it only means that an "****information"*** *referred to in Section 154 Cr.P.C. has been given to the SHO. After conducting investigation under Chapter XII of Cr.P.C the investigating police officer will file under Section 173 (2) Cr.P.C a "police report" as defined under Section 2 (r) before the Magistrate having jurisdiction. But, if the offence alleged in the complaint lodged before*

*the Police is a **non-cognizable offence**, the SHO cannot register a crime or investigate the same without the order of the Magistrate concerned under Section 155 (2) Cr.P.C. Where the Magistrate gives an order under Section 155 (2) Cr.P.C then the S.H.O can register a crime, conduct investigation and file a "police report" under Section 173 (2) Cr.P.C. It is on the said "police report" that the Magistrate can take cognizance of the offences, if any, revealed therein in exercise of his power under Section 190 (1) (b) Cr.P.C.*

Private complaint.

Q.4 What is a "*private complaint*" and whether it can include both *cognizable* and *non-cognizable* offences?

5. *A private complaint has been defined under Section 2 (d) Cr.P.C as follows:-*

> ***"(d) "Complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report."***

The expression "offence" in the above definition can include both cognizable and non-cognizable offences. When such a private complaint has been filed before a Magistrate and such complaint makes out a cognizable or non-cognizable offence punishable under law, the Magistrate can take cognizance of such offence in exercise of his power under Section 190 (1) (a) Cr.P.C.

Q.5 What is the distinction between "*cognizable offence*" and the curial act of taking cognizance of an offence?

THE DISTINCTION BETWEEN "*COGNIZABLE OFFENCE*" AND THE CURIAL ACT OF TAKING COGNIZANCE OF AN OFFENCE

6. *The expression **"cognizable offence"** has nothing to do with the process of **"taking cognizance of an offence"** by a Magistrate. The curial process of taking cognizance of an offence by a Magistrate is called **"taking cognizance of an offence"**. Regardless of the question as to whether the offence is "cognizable" or "non-cognizable", the process of "taking cognizance of the offence" by the Magistrate is a must for both cognizable and non-cognizable offences, if the Court were to proceed further either on a "complaint" or on a "police report". There is a popular misconception that a Magistrate cannot take cognizance of a "non-cognizable offence". In fact, in one of my articles published by the **live law**, I had occasion to mention an instance in which a Judge of a High Court in India had quashed the order of a Magistrate taking cognizance of a "non-cognizable offence". Obviously, the learned Judge was laboring under a mistaken impression that there is no question of the Magistrate taking cognizance in respect of a non-cognizable offence. The Advocate who filed the case before the High Court was also equally ignorant of the true legal position. It may kindly be noted that the curial act of taking cognizance of an offence by a Magistrate is the first stage (stage of **initiation**) of a case instituted by means of a "private complaint" or "Police report" and coming up for consideration before a criminal Court. The relevant provisions are Sections 190 to 199 of Chapter XV of Cr.P.C.*

TAKING COGNIZANCE OF AN OFFENCE ON A POLICE REPORT

7. If on receiving a "*Police Report"* the Magistrate applies his mind and takes the case on file against all or any of the accused persons for all or any of the offences alleged and issues process, he can legitimately be said to have *taken cognizance of the offence* under Section 190 (1) (b) Cr.P.C. (vide paras 68 to 80 of **Prasad Shrikant Purohit v. State of Maharashtra (2015) 7 SCC 440 = AIR 2015 SC 2514**).

The mechanics and procedure of taking cognizance of an offence on a "*police report*" can be better understood by discussing the following question:-

Q.6 After registering an FIR for a cognizable offence, the Police arrests the accused and produces him before the Magistrate with a remand report. The Magistrate applies his mind to the FIR and remand report and remands the accused to judicial custody for 14 days. Has the Magistrate taken cognizance of the offence?

Ans. *No. In the above situation, the Magistrate cannot be said to have taken cognizance of the offence. Cognizance can be taken only when after registering an FIR the police conduct investigation which ultimately culminate in the filing of a charge sheet. Cognizance can be taken only on the "police report" and not on the FIR. (vide* ***State of Karnataka v. Pastor P. Rajan (2006) 6 SCC 728).***

Q7. When a cognizable offence is brought to the notice of the Magistrate in a police report under Section 190 (1) (b) C.r.P.C, Is the Magistrate ***bound*** to take cognizance of the offence?

Ans. *Yes. Even though Section 190 (1) C.r.P.C uses the word "**may",** it has to be understood as "**shall"** (vide **A.C Aggarwal, Sub divl. Magistrate v.s Ram Kali AIR 1968 SC 1= 1968 Cri. LJ 82-** 5 Judges).*

Q8. Will cognizance taken on an incomplete Police report vitiate the proceedings ?

Ans. *No. If a Police Report filed under Section 173 (2) Cr.P.C, though incomplete, contains sufficient materials for the Magistrate to take cognizance of the offence, then it is a complete Report within the meaning of Section 190 (1) (b) Cr.P.C. (vide **Tara Singh v. State AIR 1951 SC 441 –** 4 Judges).*

Q.9 Can a Magistrate who does not have territorial jurisdiction to try the case, take cognizance of the offence ?

Ans. *Yes. A Magistrate taking cognizance of an offence need not necessarily have the jurisdiction to **try** the case as well. The provisions of Sections 177 and 179 Cr.P.C. do not trammel the powers of the Court to take cognizance of the offence. (vide **Trisuns Chemical Industry v. Rajesh Agarwal - (1999) 8 SCC 686 = 1999 Crl.L.J. 4325 (SC)**.*

NOTE:- (*The above decision overlooks Sections 170, 173 (2) (i) and 204 (1) Cr.P.C.*).

TAKING COGNIZANCE OF AN OFFENCE ON A "*PRIVATE COMPLAINT*"

8. The mechanics and procedure of taking cognizance of an offence on a "*private* complaint" can be better comprehended by discussing the following question:-

Q.10 (a) Has the Magistrate taken cognizance of the offences in any of the following six situations?

(b) If the Magistrate has taken cognizance of the offences in any of the following situations, in which situation did he first take cognizance of the offences?

Six Situations

i) At 4.30 p.m a Magistrate receives a private complaint alleging the commission of cognizable offences by the named accused therein. The complainant and his witnesses are present. After going through the complaint the Magistrate looks up at the clock and adjourns the case to the next day.

ii) In the above situation, instead of adjourning the case, the Magistrate issued a search warrant as requested by the complainant.

iii) In the above situation the Magistrate after making a record in the proceedings which reads ***"for recording the sworn statement of the complainant and the witnesses"*** adjourns the case to the next day.

iv) In Situation (i) above the Magistrate after adjourning the case, records the sworn statement of the complainant and the witnesses on the next day.

v) After perusing the complaint the Magistrate applies his mind and forwards the complaint to the Police under Section 156 (3) Cr.P.C. for investigation and report.

vi) After recording the sworn statement of the complainant and the witnesses, the Magistrate issues summons to the accused.

Ans. *It was in situation (iii) that the Magistrate first took cognizance of the offences. In Situation (iv) and (vi) the cognizance was already taken. In the other situations, the Magistrate cannot be said to have taken cognizance of the offence.*

Chapter XV Cr.P.C. starting with Section 200 onwards deals with the procedure for taking cognizance of an offence on a "private complaint". When on receiving a complaint, the Magistrate applies his mind for the purpose of proceeding under Chapter XV Cr.P.C., he can legitimately be said to have taken cognizance of the offence within the meaning of Section 190 (1) (a) Cr.P.C. If instead of proceeding under Chapter XV, the Magistrate, in exercise of his discretion, has taken action of some other kind such as issuing a search warrant under Section 91 Cr.P.C. or ordering investigation by the Police under Section 156 (3) Cr.P.C., he cannot be said to have taken cognizance of any offence.

> *(See* ***R.R.Chari Vs The State of U.P – AIR 1951 SC 207*** *(3 Judges)(In para 9 the observation by Das Gupta J. of Calcutta High Court in* ***Supdt. & Remembrancer of Legal Affairs, W.B. v. Alani Kumar AIR 1950 Calcutta 437*** *was extracted and approved).*
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> *The end of Para 8 in* ***Narayandas Bhagwandas v. State of West Bengal - AIR 1959 SC 1118;***

Para ***7 of Gopal Das Sindhi v. State of Assam - AIR 1961 SC 986*** *(3 Judges);*

Jamuna Singh v. Bhadai Shah – AIR 1964 SC 1541 *(3 Judge);*

Mowu v. Supdt., Special jail (1971) 3 SCC 936 – *5 Judges;*

Nirmaljit Singh Hoon v. State of West Bengal - (1973) 3 SCC 753 = AIR 1972 SC 3629;

Para ***14 of Devarapalli Lakshminarayana Reddy and Others v. Narayana Reddy - AIR 1976 SC 1672*** *(3 Judges);*

Paras ***21 to 37 of S.K. Sinha, Chief Enforcement Officer v. Video Con International Limited - (2008) 2 SCC 492 = AIR 2008 SC 1213;***

paras 13 to 17 of ***Fakhruddin Ahmad v. State of Uttaranchal (2008) 17 SCC 157 = 2008 Cri.L.J. 4377 SC;***

Para ***35 of Subramanian Swamy v. Manmohan Singh and Another (2012) 3 SCC 64;***

Paras ***46 and 47 of Sunil Bharati Mittal v. CBI (2015) 4 SCC 609 = AIR 2015 SC 923 –*** *3 Judges).*

There was, at some point of time, a view that cognizance of an offence can be said to have been taken only when the Magistrate issues process under Section 204 Cr.P.C. The Apex Court clarified the position that issue of process is really at a subsequent stage after taking cognizance of the offence. (vide ***CREF Finance Ltd V. Shree Shanti Homes (P) Ltd-***

(2005) 7 SCC 467; State of Karnataka V. Pastor P. Rajan (2006) 6 SCC 728).

9. As mentioned earlier, a Magistrate can proceed further on a private complaint only after taking cognizance of the offence, whether cognizable or non-cognizable.

PERSONS EXEMPT FROM EXAMINATION UNDER SECTION 200 Cr.P.C.

Q.11 Is there any category of persons exempted from examination under Section 200 Cr.P.C and if so, who are they?

10. *Yes. The following are those persons:-*

*(i) A **public servant** acting or purporting to act in the discharge of his official duties by virtue of Clause (a) to the 1st proviso to Section 200 Cr.P.C. All offences covered by Section 195 (1) (a) Cr.P.C. and committed by persons before "public servants" can be taken cognizance of only on the complaint of the public servant concerned. There are other non-police officers acting under various statutes who can file only complaints before the criminal Court. Such officers are also taken in by the expression "public servant". (vide Clause (a) of the proviso to Section 200)*

*(ii) A **Magistrate** who makes over the case for inquiry or trial to another Magistrate under Section 192 Cr.P.C also is exempted from examining the complainant and the witnesses. (vide Clause (b) of the proviso to Section 200)*

*(iii) A **Court** which has preferred a complaint, is exempted from examination of the complainant and the witnesses. Persons*

committing offences covered by Section 195 (1) (b) Cr.P.C. can be prosecuted only by the Court concerned by means of a private complaint. *(vide Clause (a) of the proviso to Section 200)*

Q.12 When a Magistrate making over the complaint to another Magistrate under Section 192 Cr.P.C., has been exempted from examining the complainant and the witnesses by virtue of Clause (b) to the first proviso to Section 200 Cr.P.C., does not the proviso to the said Clause (b) contradict the said Clause (b) ?

Ans. *No. Clause (b) of the 1st proviso to Section 200 only says "the Magistrate need not examine the complainant and the witnesses". There is no total bar on the Magistrate acting under Section 192 Cr.P.C. from examining the complainant and the witnesses. Therefore, if in a given case, the Magistrate making over the case to another Magistrate under Section 192 Cr.P.C. has examined the complainant and the witnesses, the proviso to Clause (b) only says that the latter Magistrate need not re-examine the complainant and the witnesses.*

REJECTION OF COMPLAINT AT THE THRESHHOLD

Q.13 Can a complaint which does not make out any offence, be dismissed at the threshold under Section 203 Cr.P.C.?

11. *No. Supposing the Magistrate finds that the averments in the complaint filed before him do not make out any offence in the sense that none of the ingredients of the offence has been pleaded in the complaint, then can he not dismiss the complaint under Section 203 Cr.P.C.? No. Dismissal of a complaint under Section 203 Cr.P.C. can be made only at the post-cognizance stage as can be seen on a perusal of*

Section 203 Cr.P.C. But at the same time, in the absence of any prohibition in the Cr.P.C. A Magistrate cannot be denied the right to prematurely terminate the proceedings at the threshold in the case of a complaint which ex facie does not make out an offence. In such a case the Magistrate will be justified in ***rejecting*** *the complaint. If, on the contrary, in spite of the complaint does not disclose any offence, the Magistrate were to proceed with the complaint, apart from it being an exercise in futility, the prospective accused person against whom there is no offence disclosed, will be unnecessarily dragged to the ordeal of a trial. (vide* ***Biju Purushothaman v. State of Kerala 2008 (3) KLT 85 = 2008 Cri.L.J. 4488****).*

INQUIRY UNDER SECTION 202 Cr.P.C.

Q.14 Is inquiry under Section 202 Cr.P.C, a must in all situations?

12. *No. Inquiry under Section 202 (1) Cr.P.C is not a must except in two situations: —*

i. *Where the accused is residing at a place beyond the local jurisdiction of the Magistrate (vide Section 202 (1).*
ii. *Where the offence alleged is exclusively triable by a Court of Session. (vide Clause (a) to the proviso to Section 202 (2).*

Q.15 Barring the above situations, is inquiry under Section 202 (1) Cr.P.C compulsory?

Ans. *No. Except in the two situations mentioned above, the Magistrate need conduct an inquiry only if, after examining the complainant and his witnesses, if any, under Section 200 Cr.P.C. the Magistrate entertains some doubt as to whether he can proceed further or not.*

This inquiry under Section 202 (1) Cr.P.C. can be conducted by the Magistrate either by himself taking evidence of witnesses on oath or he can direct an investigation by a Police officer or by any other person. (vide Section 202 (1) Cr.P.C)

Q.16 Are there situations where the Magistrate cannot direct investigation by the Police under Section 202 (1) Cr.P.C. in respect of any case, and if so, which are they?

Ans. *Yes.*

(i) If the offence is exclusively triable by a Court of Session, by virtue of Clause (a) to the proviso to Section 202 (1) Cr.P.C. the Magistrate is debarred from directing investigation.

(ii) Similarly, in a case where a complaint has been made by a Court, no direction for investigation can be given in view of Clause (b) of the proviso to Section 202 (1) Cr.P.C.

Q.17 Why is it that the proviso to Section 202 (2) Cr.P.C. contains a mandatory inquiry by the Magistrate if the offence is triable exclusively by the Court of Session?

Ans. *Since the case originated on a private complaint, unlike in the case of a police investigation, there will be no previous statements of the prosecution witnesses. The accused will be at a disadvantage if he were to go for trial without any previous statement by any of the prosecution witnesses. (vide* ***Moideenkutty Haji v. Kunhikoya 1987 (1) KLT 635 = AIR 1987 Kerala 184 (FB)***

Q.18 As per Clause (b) of the proviso to Section 202 (1) Cr.P.C., after excluding a complaint by a **"Court"**, it is stated that a direction for investigation under Section 202 (1) can be made only if the complainant and his witnesses, if any, have been examined under Section 200 Cr.P.C.

Does this proviso apply to a complaint by a **"public servant**" who has been exempted from examination under Section 200 by virtue of Clause (a) of the proviso to Section 200?

Ans. *Yes. While in the case of a complaint by a* ***"Court"****, no direction for investigation can be given under Section 202 (1) Cr.P.C, a direction for investigation can be given in respect of all other complaints including those by* ***"public servants"****. Hence, if a direction for investigation is to be issued under Section 202 (1) Cr.P.C. with regard to the complaint made by a public servant, he and his witnesses, if any, will have to be examined under Section 200 as in the case of a complaint by any other person.*

DISMISSAL OF COMPLAINT UNDER SECTION 203 Cr.P.C.

Q.19 can a complaint be dismissed under Section 203 Cr.P.C at the post-cognizance stage?

13. *Yes. If after considering the statements on oath (if any) of the complainant and of the witnesses and the result of inquiry or investigation (if any) under Section 202 Cr.P.C., the Magistrate is of the view that there is no sufficient ground for proceeding further, he is given the power under Section 203 Cr.P.C. to dismiss the complaint after briefly recording his reasons for doing so.*

Q20. If the accused is present in Court during the examination of the complainant or his witnesses under Section 200 Cr.P.C. or during Section 202 inquiry, can he not participate in the proceedings?

Ans. *No. He can only remain in Court and be informed of what is going on in the Court. (vide para 9 of* ***Sashi Jena v. Khadal Swain (2004) 4 SCC 236 = AIR 2004 SC 1492;*** *Para 48 of* ***Manharibhai Muljibhai Kakkadia v.***

***Shaileshbhai Mohanbhai patel (2012) 10 SCC 517 = 2013 Cri.L.J. 144 SC** – 3 Judges).*

COGNIZANCE OF AN OFFENCE BY A COURT OF SESSION

Q21. Is not the Court of Session entitled to directly take cognizance of an offence exclusively triable by a Court of Session, either on a "*Police Report*" or a "*private complaint*" and is there any exception to it?

14. *Ordinarily no. In view of the mandate under **Section 193 Cr.P.C**, a court of Session can take cognizance of an offence as a Court of original jurisdiction only on a committal of the case to it by a Magistrate either under Sec. 209 or under Sec. 323 Cr.P.C., unless the law provides otherwise.*

Exceptions to Sec. 193 :-

1. *Where the offence of defamation falling under Chapter XXI I.P.C. is committed against the President of India, Governor, a Minister or other dignitaries specified in Section 199 (2) Cr.P.C.*

2. *Where a special law provides for taking cognizance without a committal.*

Example :

1. *Sec. 36 A (1) (d) of N.D.P.S. Act.*

2. *Sec. 5(1) of the Prevention of Corruption Act, 1988.*

3. *Sec. 14 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 w.e.f. 01-01-2016*

COMMENCEMENT OF PROCEEDINGS

Q22. Is it necessary that "***initiation of proceedings***" under Chapter XV Cr.P.C. should precede ***"commencement of proceedings"*** under Chapter XVI ?

Ans. *Yes. (Vide para 24 of* ***S.K. Sinha, Chief Enforcement Officer v. Videocon International Ltd. (2008) 2 SCC 492 = AIR 2008 SC 1213****).*

15. It is only after the Magistrate takes cognizance of the offence and does not dismiss the complaint under Section 203 Cr.P.C. that he proceeds to the next stage, namely, the stage of "***Commencement of proceedings****"* by issuing process under Section 204 Cr.P.C.

THE T R I A L P R O P E R

16. Every case is instituted before a Magistrate either through the Police by means of a ***"Police Report"*** or directly by means of a ***"complaint"***. (vide para 12 of **State of Gujarat v. Girish Radhakrishnan Varde (2014) 3 SCC 659).** Even though the core procedure for the trial of summary, summons, warrant and sessions is the same, there are characteristics which are peculiar to each one of those trials.

Substance of accusation / Charge

17. Depending on the nature of the case –

i) *Substance of accusation/Particulars of the offence, to be read over and explained to the accused and his plea to be taken, if it is a* ***summons trial***

*or a **summary trial**. Since no charge is framed, there cannot be any discharge.*

OR

ii) *If it is a **Warrant trial** or **Sessions trial**, charge is to be framed against the accused and his plea is to be taken or the accused is to be discharged.*

The leading case on the framing of charge and the irregularities attending the same is ***Willie (William) Slaney v. State of M.P. AIR 1956 SC 116 = 1956 Cri.L.J. 291 – 5 Judges.***

Q23. When does the trial begin in summary and summons cases ?

18. *In summary and summons trial, the trial begins with the stating of the substance of accusation (**particulars of the offence**). (vide **Santhamma Radhamani Amma v. Kunju Pillai 1980 KLT 393 = 1981 Cri.L.J. 247 (Kerala);** Para 9 of **S.V. Enterprises v. Rajesekharan Nair - 2006 (3) KLT 930 = 2007 Cri.L.J. 1626 (Kerala**).*

Summary - Section 262 (1) r/w. 251

Summons - Sec. 251

WARRANT TRIAL & SESSIONS TRIAL

19. Warrant trial is for offences punishable with imprisonment exceeding 2 years. Sessions trail is for offences punishable with imprisonment exceeding 7 years. The procedure for trial in Warrant and Sessions cases is similar except for certain minor changes.

Q24. When does the trial start in warrant and sessions cases ?

20. *In warrant and sessions trial, the trial starts with the framing of charge (vide* ***Ratilal Bhaji v. State of Maharashtra - AIR 1979 SC 984****)*

Charge is framed in -

Warrant case - Sec. 240 (police charge case)
- Sec. 246 (complaint case)
Sessions case - Sec. 228

NOTE: *If trial starts with the framing of charge, then what is the meaning of the words "****claims to be tried****" occurring in the following Sections :-*

Section 242 (1) – Warrant case on a Police Report
Section 246 (4) – Warrant case otherwise than on Police Report
Section 230 - Sessions case

If trial starts with the framing of charge, then does not the trial start before a Court of Session when that Court during preliminary hearing under Section 227 Cr.P.C. finds that the offence is not exclusively triable by a Court of Session and frames a charge under Section 228 (1) (a) Cr.P.C. and transfers the case ***for trial*** *to the Chief Judicial Magistrate or Judicial Magistrate of first class ?*
My humble view is that trial can start only when, after framing the charge the accused pleads not guilty and claims to be tried. There is no trial, in my view, when the accused voluntarily pleads guilty and is convicted and sentenced without a trial.

PLEADING GUILTY (JUDICIAL CONFESSION)

Q25. When the accused pleads guilty, is it an instance of judicial confession and should the Magistrate follow the safeguards provided under Section 164 (3) and (4) Cr.P.C. ?

21. *Yes. Cases where the accused pleads guilty are instances of judicial confession. Hence, the Magistrate is bound to follow the*

safeguards provided under Sec. 164 (2) Cr.P.C. If the Magistrate is satisfied that the accused has voluntarily pleaded guilty, he can in his discretion straightaway convict the accused. The appropriate provisions enabling the Magistrate to do so are given below :-

Provision in Cr.P.C.	***T y p e o f t r i a l***
Sec. 252	*in summons cases*
Sec. 241	*in warrant cases instituted on a police report*
Sec. 246 (3)	*in warrant cases instituted otherwise than on Police Report.*
Sec. 229	*in Sessions Cases.*

DISCHARGE/CHARGE

The procedure for discharging the accused or for framing charge against the accused can be illustrated by the following table :-

DISCHARGE

WARRANT TRIAL (Chapter XIX)

Instituted on a Police Report (Part A of Chapter XIX)

S.239 - Discharge, if the charge against the accused is groundless

Instituted otherwise than on a Police Report (Part B of Chapter XIX)

S.245(2)- Discharge at any stage, if the charge against the accused is groundless.

S.245(1)- Discharge, if upon taking all evidence u/s 244 no case against the accused is made out which, if unrebutted, would warrant his conviction.

SESSIONS TRAIL (Chapter XVIII)

Section 227 – Discharge, if the Judge considers that there is no sufficient ground for proceeding against the accused.

FRAME CHARGE

WARRANT TRIAL (Chapter XIX)

On a Police Report (Part A of Chapter XIX)

Frame charge u/s 240(1).

Otherwise than on a Police Report (Part B of Chapter XIX)

Frame charge u/s 246(1).

1) *if there is ground for presuming that the accused has committed an offence triable under Chapter XIX.*

2) *if the Magistrate is competent to try the offence.*

3) *if the offence could be adequately punished by the Magistrate.*

SESSIONS TRAIL (Chapter XVIII)

S. 228(1)(b) – Frame charge if there is ground for presuming that the accused has committed an offence which is exclusively triable by a Court of Session.

S. 228(1)(a) – Frame charge and transfer the case to JFCM if there is ground for presuming that the accused has committed an offence which, however, is **not** exclusively triable by a Court of Session.

Discharging the accused or framing a charge against him

Court has a very responsible duty while deciding to discharge the accused or framing charge against him. Any mistake, error or omission at this stage can bring about failure of justice. There is a practice among certain Judges to make a verbatim reproduction of the Police charge. That is a bad practice. Judge has to independently apply his mind and frame charge in accordance with Chapter XVII of Cr.P.C. After reading the Court charge it has to be read and explained to the accused in the language which he understands and it is only thereafter that his plea should be taken.

Police Report to the effect that offence has not been made out in investigation, is not binding on the Court which has to make an independent examination of the materials. **(**Vide **State of Orissa v. Habibulla Khan (2003) 12 SCC 129 = 2003 KHC 1921)**

A charge is a written notice of the precise and specific accusation against the accused and which he is required to meet.(vide **Waroo v. Emperor AIR 1948 Sind 40**).

Section 2 (b) Cr.P.C defines the word "charge" as "*Charge includes any head of charge when the charge contains more heads than one*".

The necessity of a system of written accusation specifying a definite criminal offence is of the essence of criminal procedure. (vide **Subramania 28 Indian Appeals 257(PC)**.

Questions on Discharge/Charge

Q.26 What is the criteria under Sec. 227 Cr.P.C. for discharging and under Sec. 228 Cr.P.C. for framing a charge against the accused ?

① *Charge can be framed if there is* ***prima facie*** *case.*

(Union of India v. Prafulla Kumar Samal and Another (1979) 3 SCC 4 = AIR 1979 SC 366)

(R.S. Nayak v. A.R. Antulay and Another (1986) 2 SCC 716 = AIR 1986 SC 2045)

(State of H.P. v. Krishan Lal Pardhan and Others (1987) 2 SCC 17 = AIR 1987 SC 773)

(State of Delhi v. Gyan Devi and Others (2000) 8 SCC 239 = AIR 2001 SC 40)

(2) *Charge can be framed only if there is* ***grave*** *or* ***strong suspicion*** *that the accused had committed the offence.*

(Union of India v. Prafulla Kumar Samal and Another (1979) 3 SCC 4 = AIR 1979 SC 366)

(*Para 17 of* ***Rumi Dhar v. State of West Bengal and Another (2009) 6 SCC 364 = AIR 2009 SC 2195).***

(3) *Court will be justified in discharging the accused if the evidence produced gives rise to* ***some suspicion.*** *In other words,* ***mere suspicion*** *is not enough for framing charge.*

1994 Supp. (2) SCC 707

(Dilawar Babu Kurane v. State of Maharahstra (2002) 2 SCC 135 = AIR 2002 SC 564)

(Yogesh @ Sachin Jagdish Joshi v. State of Maharashtra (2008) 10 SCC 394 = AIR 2008 SC 2991)

(Onkar Nath Mishra v. State (NCT Of Delhi) and Another (2008) 2 SCC 561 = 2008 Cri.L.J. 1391 = 2008 (1) KHC 217)

(Sanghi Brothers (Indore) (P) Ltd. v. Sanjay Chaudhary and Others (2008) 10 SCC 681 = AIR 2009 SC 9)

④ *Holding of a* ***mini trial*** *at that stage is to be avoided.*

(State of Orissa v. Debendra Nath Padhi (2005) 1 SCC 568 = AIR 2005 SC 359 – *Para 18 – 3 Judges).*

(Indu Jain v. State of M.P. and Others (2008) 15 SCC 341 = AIR 2009 SC 976)

⑤ *Even if the Court thinks that the accused* ***might have*** *committed the offence, charge can be framed.*

(State of Maharashtra v. Som Nath Thapa (1996) 4 SCC 659 = AIR 1996 SC 1744 – *3 Judges).*

⑥ ***Possibility*** *as against* ***certainty*** *is sufficient for framing charge.*

(Soma Chakravarthy and Others v. State through CBI and Another (2007) 5 SCC 403 = AIR 2007 SC 2149)

(Bharat Parikh v. CBI and Another (2008) 10 SCC 109 = AIR 2009 SC Supp. 523).

⑦ *At the time of framing charge the* ***materials*** *produced by the prosecution have to be* ***accepted as true.*** *The* ***probative value*** *of those materials cannot be gone into by the Court.*

(Soma Chakravarthy and Others v. State through CBI and Another (2007) 5 SCC 403 = AIR 2007 SC 2149)

8 *It is immaterial whether the case is based on* ***direct*** *or* ***circumstantial*** *evidence.*

(State of A.P. v. Golconda Linga Swamy (2004) 6 SCC 522 = AIR 2004 SC 3967

(2014) 3 SCC (Cri) 529 – *Para 29.*

9 *Analysis of all the materials by deciding the* ***pros*** *and* ***cons****,* ***reliability*** *or* ***acceptability*** *of those materials, not to be undertaken.*

(K. Ramakrishna and Others v. State of Bihar and Another (2000) 8 SCC 547 = AIR 2000 SC 3330 – *Para 4****).***

(Sajjan Kumar v. Central Bureau of Investigation (2010) 9 SCC 368 = 2010 KHC 4691).

10 *Order should not be one* ***virtually*** *passing an* ***order of acquittal*** *in the* ***garb of discharge.***

(2009) 10 SCC 429.

11 *At the stage of framing charge the Court is concerned only with the question as to whether prima facie there appears the*

existence *of any material and not the* ***sufficiency*** *of the materials.*

(para 45 of ***Parkash Singh Badal v. State of Punjab (2007) 1 SCC 1 = AIR 2007 SC 1274****).*

Q.27 What is the object of charge?

Ans. *The object of charge is to warn the accused person of the case he is to answer. It cannot be treated as if it was part of a ceremonial. (vide* ***B.N.Srikantiah v. State of Mysore AIR 1958 SC 672****).*

Q.28 Is imperfection in the charge curable?

Ans. *Yes, provided no prejudice has been shown to have resulted on account of it. (vide* ***B.N.Srikantiah v. State of Mysore AIR 1958 SC 672; Mohd. Ankoos v. High Court of AP (2010) 1 SCC 94****).*

Q.29 What are the contents of the charge framed by the Court?

Ans. *Section 211 Cr.P.C deals with the form of charge and contents of charge. The form of charge referred to in Section 211 is available in form No.32 of the Second Schedule to Cr.P.C. It reveals that the details of each offence are to be stated with reference to the particular accused who committed the offence and the person against whom such offence was committed. (vide* ***Ramesan v. State of Kerala 2007 (1) KHC 853; 2007 Cri.L.J. 1637 (Kerala).***

Q.30 Is not the non-framing of charge fatal?

Ans. *Not always, except when the convict is able to establish that the defect in framing the charges has caused real prejudice to him and that he was not informed as to what was the real case against him and that he could not defend himself properly. (vide* ***Sanichar Sahni v. State of Bihar (2009) 7 SCC 198 = AIR 2010 SC 3786****). Sections 215 and 464 Cr.P.C may also be borne in mind.*

Q.31 Is not a technical defect in the charge material?

Ans. *No, unless prejudice has been caused to the accused so as to attract Section 215 Cr.P.C. (vide* ***Chaturdas Bhagwandas Patel v. State of Gujarat (1976) 3 SCC 46; State v. Nalini (1999) 5 SCC 253****).*

Q.32 Is it not ***proof*** of the materials relied on by the prosecution which is relevant for establishing the validity of the charge ?

Ans. *No. It is the* ***allegation*** *which is relevant for establishing the validity of the charge. (vide* ***Bhagwan Das Jagdish Chander v. Delhi Admn. (1975) 1 SCC 866 = AIR 1975 SC 1309 –*** *3 Judges)*

Q.33 At the stage of framing charge is it not necessary for the Court to meticulously consider the evidence and other materials produced by the prosecution ?

Ans. *No. A meticulous consideration of the materials and evidence by the Court is not required at that stage. (vide* ***Mohd. Akbar Dar v. State of J & K 1981 Supp. SCC 80 = AIR 1981 SC 1548; State v. Bangarappa (2001) 1 SCC 369 = AIR 2001 SC 222 (P.C. Act case).*** *What is to be examined is as to whether* ***there is ground***

for presuming that the accused has committed the offence*.*
(See Sections 240 and 246 in warrant trial).

Q.34 When a wrong Section is mentioned in the FIR, is it permissible for the Court state the appropriate Section while framing charge ?

Ans. *Yes. (vide para 23 of* ***CBI v. Tapan Kumar Singh (2003) 6 SCC 175 = AIR 2003 SC 4140****).*

Q.35 Accused is convicted under Section 302 IPC. Is it not permissible for the Court to convict the accused for the offence punishable under Section 307 read with Section 34 IPC also in connection with the same murder ?

Ans*. No. (vide* ***Jagtar Singh v. State of Punjab 1994 Supp. (1) SCC 65 = AIR 1993 SC 2448****).*

Q.36 Even though the recitals in the charge have stated that the main object of the criminal conspiracy was cheating by impersonation, in the charge under Section 419 IPC there is no specific mention of cheating by personation. Is not the accused justified in contenting that he was charged for cheating simpliciter?

Ans. *No. Since the recitals in the charge clearly mentioned that the criminal conspiracy was for cheating by personation, merely because the said words were not repeated in the specific charge under Section 417 IPC, it cannot be said that the accused could have been mislead by the charge. (vide* ***Yash Pal Mittal v. State of Punjab (1977) 4 SCC 540 = AIR 1977 SC 2433 –*** *3 Judges).*

Q.37 What is the distinction between "*common intention"* under Section 34 IPC and "*common object*" under Section 149 IPC?

Ans. *"Common intention" implies a pre-arranged plan and acting in concert pursuant to the said plan. Such pre-concert or pre-planning may develop on the spot or during the course of commission of the offence. (vide* ***Kripal v. State of UP AIR 1954 SC 706****). The crucial test is that such pre-arranged plan must precede the act of constituting the offence. (vide Para 38 of* ***Suresh v. State of UP (2001) 3 SCC 673 = AIR 2001 SC 1344***- 3 Judges*****;*** *Paras 52 to 55 and 57 of* ***Abdul Sayeed v. State of MP (2010) 10 SCC 259****). Common intention means that each member of the group is aware of the act to be committed. (vide* ***Abdul Sayeed v. State of MP (2010) 10 SCC 259****)*

"*Common object" is different from "common intention" as it does not require a prior concert and a common meeting of minds before the attack. It is enough if each has the same object in view and 5 or more persons act as an assembly to achieve that object. (vide paras 7 and 8 of* ***Sunil Kumar v. State of Rajasthan (2005) 9 SCC 283 = AIR 2005 SC 1096****). Commission of* ***overt act*** *is not necessary on the part of a member of an unlawful assembly. (vide Para 13 of* ***Kharuddin v. State of WB (2013) 5 SCC 753 = AIR 2013 SC 2354****).Mere presence or association with other members alone does not per se become sufficient to hold every one of them criminally liable for the offence committed by the others unless there is sufficient evidence on record to show that* ***each of them intended or knew the likelihood*** *of the commission of such an offending act. (vide Paras 22 and 23 of* ***Ramachandran v. State of Kerala (2011) 9***

***SCC 257 = AIR 2011 SC 3581**). "Other offence" occurring in clause "Third" of Section 141 IPC is not confined to mischief or criminal trespass in view of the definition of "offence" in Section 40 of IPC. The words "likely to cause death" occurring in Section 148 IPC is also an indicator to show that the rule of "ejusdem generis" has no application. (vide **Manga v. State of Uttarkhand (2013) 7 SCC 629**).*

Q.38 Where a charge has been framed against 5 named accused persons for the offence of murder under Section 302 read with Section 149 IPC and if two out of the above 5 persons are acquitted, can the surviving 3 accused persons be convicted for murder under Section 302 read with Section 149 IPC or under Section 302 simpliciter ?

***Ans.** No. Where a charge has been framed against 5 named accused persons for the offence of murder under Section 302 read with Section 149 IPC and if two out of the above 5 persons are acquitted, then the charge for Section 302 read with Section 149 IPC cannot be sustained as against the remaining 3 accused persons since with the acquittal of 2 accused persons there is no unlawful assembly for which there should at least be 5 accused persons. If, on the contrary, the charge against them was that some other known or unknown persons were also involved in the assault, then there will be no legal impediment in convicting the surviving 3 accused persons for the offence under Section 302 read with Section 149 IPC. In the absence of a specific charge for the offence under Section 302 IPC alone, the surviving accused cannot be convicted for murder simpliciter as well. (vide paras*

10 and 11 of ***Subran v. State of Kerala (1993) 3 SCC 32 = 1993 Cri.L.J. 1387 –*** *3 Judges)*

Q.39 Is it permissible for the trial Court, on a consideration of the broad probabilities of the case and based upon the total effect of the evidence and documents produced, to decide to add to or to alter the charge ?

Ans. *Yes. There is no legal bar to appropriately act as the exigencies of the case warrant or necessitate. (vide para 15 of* ***Bhimanna v. State of Karnataka (2012) 9 SCC 650 = AIR 2012 SC 3026; Hasanbhai Valibhai Qureshi v. State of Gujarat (2004) 5 SCC 347 = AIR 2004 SC 2078****).*

Q.40 Can the Appellate Court add to or alter the charge ?

Ans. *Yes. Under Section 385 (2) read with 386 (e) Cr.P.C. (vide para 16 of* ***Bhimanna v. State of Karnataka (2012) 9 SCC 650 = AIR 2012 SC 3026; Kantilal Chandulal Mehta v. State of Maharashtra (1969) 3 SCC 166 = AIR 1970 SC 359****).*
Where the trial Court convicted the accused under Section 302 with the aid of Section 149 IPC without any justification, it was held that the High Court ought to have discussed the relevant aspects and ought to have held that the accused were liable to be convicted under Section 302 not with the aid of Section 149 but with the aid of Section 34 IPC. (vide paras 40 and 41 of ***Murli v. State of Rajasthan (2009) 9 SCC 417****).*

Q.41 What do you mean by "***prejudice***" ?

Ans. *When the accused alleges prejudice, it has to be shown that the accused has suffered some disability or detriment in the protections available to him under the Indian criminal jurisprudence and that this has occasioned a failure of justice. Wherever a plea of prejudice is raised by the accused, it must be examined with reference to the above rights and safeguards, as it is the violation of these rights alone that may result in the weakening of the case of the prosecution and benefit to the accused in accordance with law. The plea of prejudice has to be in relation to investigation or trial and not in relation to matters falling beyond their scope. (vide paras 36 to 38 of* ***Rafiq Ahmad v. State of U.P. (2011) 8 SCC 300 = 2011 Cri.L.J. 4399; Shyam Behari v. State of U.P. AIR 1957 SC 320 = 1957 Cri.L.J. 416****). Once prejudice is caused to the accused during trial, it occasions "failure of justice". (vide paras 43 and 45 of* ***Rattiram v. State of M.P. (2012) 4 SCC 516*** *- 3 Judges).*

Q.42 What is meant by "***failure of justice***" ?

Ans. *One of the cardinal principles of natural justice is that no man should be condemned without being heard (audi alteram partem). But Courts often hesitate to approve the contention that failure of justice had occasioned merely because a person was not heard on a particular aspect. However, if the aspect is of such a nature that non-explanation of it has contributed to penalizing an individual, the Court should say that since he was not given the opportunity to explain that aspect there was failure of justice on account of non-compliance with the principle of natural justice. (vide para 24 of* ***Shamnsaheb M. Multtani v.***

State of Karnataka (2001) 2 SCC 577 = AIR 2001 SC 921 – *3 Judges).*

Q.43 Will not a defect in the language or in the narration or in the form of charge, render the conviction bad ?

Ans. *No, unless the accused had suffered prejudice thereby. (vide para 34 of* ***Mohd. Ankoos v. High Court of A.P. (2010) 1 SCC 94****).*

Q.44 The defence contends that since Sec. 149 I.P.C. creates a distinct and separate offence, conviction of the accused with the aid of Sec. 149 is unsustainable in the absence of a specific charge under Section 149. Is the said contention sound ?

Ans. *No, provided the evidence discloses that the particular accused assembled together armed with deadly weapons and was party to the assault.* ***(Annareddy Sambasiva Reddy v. State of A.P. - (2009) 12 SCC 546 = AIR 2009 SC 2661 . See also Sections 215 and 464 Cr.P.C.***

Q.45 Since Section 216 Cr.P.C. enables the Court to alter or add to the charge, is it not permissible for the Court to allow an application under Section 216 Cr.P.C. in respect of an accused who has already been discharged ?

Ans. *No. Alteration or addition of a charge pre-supposes the existence of a charge against the accused. When after the accused was discharged, there was no charge existing against the said accused (See* ***Sohan Lal v. State of Rajasthan – (1990) 4 SCC 580 = AIR 1990 SC 2158****).*

Q.46 Does it not follow that the trial has to commence *de novo* after the addition or alteration of charge ?

Ans. *Court has discretion to direct a new trial after the addition or alteration of charge. But, unless there is a specific order to that effect it cannot be presumed that a new trial has commenced. No direction for new trial can be given unless proceeding with the trial is likely to prejudice the accused or the prosecution. Even if there was any irregularity in continuation of the trial after framing of additional charges, judgment not open to be set aside in the absence of failure or justice in view of Sec. 465 Cr.P.C. (vide* ***Ranbir Yadav. v. State of Bihar (1995) 4 SCC 392 = AIR 1995 SC 1219****).*

Q.47 Accused was convicted under Section 302 I.P.C. read with Sec. 34 I.P.C. without a charge under Sec. 34 I.P.C. The reason given in support of the conviction is that common intention can be formed at the spot and inference regarding such common intention can be drawn even in the absence of evidence of pre-concert of minds. Is the conviction sustainable ?

Ans. *Yes. Even if there is no evidence of prior meeting of minds, if the sequence of events which is unfolded during the course of evidence clearly indicates the pre-determined minds of the accused persons to kill the deceased, the conviction of the accused with the aid of Sec. 34 I.P.C. without a formal charge in that behalf will be proper. (See* ***Ranji Singh v. State of Bihar – (2001) 9 SCC 528 = AIR 2001 SC 3853****).*

Q.48 A1 to A3 were charged under Sec. 302 and 201 read with Sec. 34 I.P.C. A2 and A3 were acquitted of the charge under Sec. 302 read with Sec. 34 I.P.C.. Can A1 alone be convicted under Sec. 302 I.P.C. simpliciter without an independent charge under Sec. 302 I.P.C. ?

Ans. *Yes. If it is established that A1 committed the crime individually, he can be convicted under Sec. 302 I.P.C. even without an independent charge under Sec. 302 I.P.C.* ***(Kishore Chand v. State of H.P. (1991) 1 SCC 286 = AIR 1990 SC 2140).***

Q.49 What do you mean by misjoinder of charges?

Ans. *Section 218 Cr.P.C is under the heading "joinder of charges". Therefore, if the joinder of charges is in contravention of the procedure prescribed under Section 218 Cr.P.C. it would be misjoinder of charges* ***(Kamalanantha v. State of T.N. (2005) 5 SCC 194 = AIR 2005 SC 2132).***

***Q.*50** What is the object of Section 218 Cr.P.C?

Ans. *The object of Section 218 is to save the accused from being embarrassed in his defense if distinct offences are lumped together in one charge or in separate charges and tried together. (vide* ***Aftab Ahmad Khan v. State of Hyderabad AIR 1954 SC 436****).*

Section 218 Cr.P.C lays dawn the principle of separate charges for distinct offences. The rule under Section 218 Cr.P.C is that there should be separate charges for distinct offences. ***Exceptions*** *to the said rule are the following :-*

i) *S. 219 – 3 offences of the same kind within one year may be charged together.*

ii) *S. 220 – More than one offence committed during same transaction may be charged at the same trial.*

iii) *S. 221 – Where it is doubtful as to what offence has been committed.*

iv) *S. 223 – Class of persons who may be charged jointly.*

Q.51 What is the meaning of "same transaction" occurring in Sections 220 and 223 Cr.P.C?

Ans. *To constitute "same transaction", the series of facts alleged against the accused must be connected together in some way by proximity of time, unity of place, unity or community of purpose or design and continuity of action until the series of acts or group of connected acts come to an end. (vide* ***State of AP v. Cheemalapati Ganeshwara Rao AIR 1963 SC 1850****).*

Q.52 What is a "*minor offence*" within the meaning of Section 222 Cr.P.C?

Ans. *Even though the expression "minor offence" under Section 222 Cr.P.C has not been defined in the Cr.P.C, it can be discerned from the context that the test of minor offence is merely that the prescribed punishment is less than the major offence. The two illustrations provided in the Section will bring the above point home well. Only if the two offences are* ***cognate offences*** *wherein the main ingredients are common, the one punishable*

among them with a lesser sentence can be regarded as minor offence vis-à-vis the other offence. (vide ***Shamnsaheb M. Multtani v. State of Karnataka (2001) 2 SCC 577****).*

Q.53 When the main offence with which the accused is charged is murder, can he not be convicted of an offence under Section 411 IPC (*dishonestly receiving stolen property*) by applying Section 222 (2) Cr.P.C?

Ans *No. The minor offence contemplated under Section 222 (2) Cr.P.C must be a cognate offence in relation to the main offence. The major and minor offences must have the main ingredients in common. (vide* ***V.Thomachan v. State of Kerala 1978 Cri.L.J. 498 (Kerala)****.*

Q.54 Where the accused is acquitted of an offence of a higher degree, can he be convicted for a lesser offence?

Ans. *Yes. Depending on the evidence on record. (vide* ***K. Prema S Rao v. Yadla Srinivasa Rao (2003) 1 SCC 217****). See Section 222 Cr.P.C.*

Q.55 Is it not permissible for the accused to demand as of right his trial with co-accused under Section 223 Cr.P.C?

Ans. *No. (vide* ***A.R.Antulay v. R.S.Nayak (1988) 2 SCC 602****).*

Q.56 Is not a conviction and sentence recorded by the Court in a joint trial, invalid?

Ans. *No. In the absence of proof that failure of justice had occasioned, the conviction and sentence in a joint trial cannot be invalid.*

(vide ***Prem Chand v. State of Haryana 1989*** **Supp. (1) SCC 286***).*

Q.57 The charge is conspiracy to commit an offence followed by a charge in respect of that offence as well. Conspiracy is not established and the accused is acquitted of the offence of conspiracy. Can the accused be convicted in respect of the substantive offence ?

Ans. *Yes. See.* ***T. Shankar Prasad v. State of A.P. (2004) 3 SCC 753= AIR 2004 SC 1242****.*

Q.58 The charge is criminal conspiracy to commit a particular offence. Prosecution failed to prove that particular offence. Can there be a conviction for criminal conspiracy alone ?

Ans. *Yes. Criminal conspiracy is an offence independent of other offences (vide* ***R. Venkatkrishnan v. C.B.I. - (2009) 11 SCC 737).***

Q.59 The overt acts committed pursuant to the criminal conspiracy were committed beyond the jurisdiction of the Court having jurisdiction to try the offence of criminal conspiracy. Can that Court try the other offences ?

Ans. *Yes. (vide* ***R.K. Dalmia v. Delhi Admn. AIR 1962 SC 1821; Purushothamdas Dalmia v. State of W.B. - AIR 1961 SC 1589).***

Q.60 Court is having jurisdiction to try the offences committed in pursuance of the criminal conspiracy. But the offence of criminal

conspiracy was committed outside its territorial limits. Can that court also try the offence of criminal conspiracy ?

Ans. *Yes.* ***L.N. Mukherjee v. State of Madras – AIR 1961 SC 1601****.*

Q.61 In a charge for offences punishable under Sections 498 – A and 304 – B I.P.C. against the accused for subjecting his deceased wife to such cruelty and harassment as to drive her to commit suicide, is it permissible for the court to convict the accused without a specific charge for an offence punishable under Sec. 306 I.P.C. by drawing the presumption under Sec. 113 – A of the Evidence Act along with or instead of Sec. 498 – A I.P.C. in a case where the offence under Sec. 304 – B has not been proved?

Ans. *Yes. Section 221 Cr.P.C. enables such a course. (See* ***K. Prema S.Rao v. Yadia Srinivasa Rao – (2003) 1 SCC 217 =AIR 2003 SC 11).*** *See also* ***Dinesh Seth v. State (NCT of Delhi); (2008) 14 SCC 94; Hira Lal v. State (Government of NCT of Delhi ; (2003) 8 SCC 80= AIR 2003 SC 2865; Kaliyaperumal v. State of T.N. (2004) 9 SCC 157 = AIR 2003 SC 3828; Narvinder Singh v. State of Punjab – (2011) 2 SCC 47.***

Q.62 In an altercation between the husband and wife not involving any demand for money or property, the husband in response to a retort by the wife, slaps her on the cheek. She lodges a complaint before the police who eventually charge sheets the husband for an offence punishable under Section 498 A IPC. The husband pleads for a discharge before the Magistrate. Can he succeed ?

Ans. *Yes. The cruelty envisaged by Section 498 A of IPC is any willful conduct on the part of the husband* ***as is likely to drive the***

woman *to cause grave injury to the woman. Here the woman has not been driven to cause any injury to herself. The act of the husband may probably amount to an offence Section 323 IPC which is non-cognizable and there is no accusation of that offence also. If, upon the husband slapping the wife she were to go and cut the vein on her hand, such a conduct may attract Section 498 A IPC. (vide the Article titled* ***"A re-look at Section 498 A of the Indian Penal Code, 1860"*** *by Justice V. Ramkumar Published* ***in 2018 (3) KHC (journal) Page 27).***

Q.63 The charge is that the accused committed murder of her husband punishable under Sec. 302 I.P.C. and also caused disappearance of the evidence of murder punishable under Sec. 201 I.P.C. Accused is acquitted of the offence of murder. Can she be convicted under Sec. 201 I.P.C ?

Ans. Yes. See **Treesa v. State of Kerala – 1991 (1) KLT 503; Sukhram v. State of Maharashtra – (2007) 7 SCC 502 = AIR 2007 SC 3050.**

Q.64 Where the accused are charged under Section 302 read with Sec. 149 I.P.C., can they be convicted for Sec. 302 with the aid of Sec. 109 I.P.C. without a specific charge under Section109 I.P.C ?

Ans. *No. Abetment is a distinct offence for which a charge should be framed. See* ***Wakil Yadav v. State of Bihar (2000) 10 SCC 500; Joseph Kurian v. State of Kerala (1994) 6 SCC 35 = AIR 1995 SC 4.***

Q.65 Where the accused in a murder case are acquitted of the charge under Sec. 148 I.P.C (which was the only offence relating to constructive liability charged against the accused) can they be convicted under Sec. 302 read with Sec. 149 I.P.C, in the absence of a charge under Section 149 IPC ?

Ans. *No. See* ***Mohammed Ankoos v. High Court of A.P. - (2010) 1 SCC 94*** *where the only offence relating to constructive liability charged against the accused was Section 148 IPC and the accused stood acquitted of the charge under Section 148 IPC. In such circumstances the Supreme Court held that it was impermissible to convict the accused under Section 302 IPC by calling into aid Section 149 IPC for which there was no charge.*

Q.66 Is not the Court entitled to convict the accused for an offence punishable under Section 304B IPC by resort to Section 222 Cr.P.C in a case where the charge is under Section 302 IPC ?

Ans. *No. Section 304B IPC cannot be regarded as a minor offence compared to Section 302 IPC. (vide* ***S.M. Multtani v. State of Karnataka 2001 (2) SCC 577 = AIR 2001 SC 921****).*

Q.67 Accused persons faced trial for charge under Sections 211, 215, 216, 218, 221 and 464 I.P.C. There was no charge under Section 34 I.P.C. Court convicted them with the aid of Sec. 34 I.P.C. Is it legal ?

Ans. *Yes. The conviction can be set aside only if the accused are able to show* ***prejudice*** *due to the failure to frame the charge. (****Abdul***

Sayeed v. State of M.P. (2010) 10 SCC 259; Anil Sharma v. State of Jharkand (2004) 5 SCC 679 = AIR 2004 SC 2294).

Q.68 Can an irregularity in the charge become an incurable illegality?

Ans. *Yes. An irregularity in the charge as contemplated by Section 464 Cr.P.C. (Section 535 of old Code) becomes an incurable illegality when failure of justice has happened. Where the accused persons charged under Sections 448 and 302 read with Section 149 IPC have been convicted under Section 302 read with Section 34 IPC, such an irregularity will not vitiate the trial. (vide* ***Bhoor Singh v. State of Punjab (1974) 4 SCC 754 = AIR 1974 SC 1256****).*

Q.69 How to determine the question of prejudice?

Ans. *For judging the question of prejudice, the Court must act with a broad vision and look to the substance and not to the technicalities. The main concern of the Court should be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defent himself. The principles laid down in* ***Slaney's case (Willie (William) Slaney v. State of M.P. AIR 1956 SC 116 = 1956 Cri.L.J. 291 – 5 Judges)*** *will have to be followed throughout. (vide* ***State of W.B. v. Liasal Haque (1989) 3 SCC 166 = AIR 1989 SC 129****).*

Q.70 What is the extent of the power of the Court to alter charge ?

Ans. *There is an unrestricted power in the Court to add or alter any charge under Section 216 Cr.P.C. whenever the Court finds that the charge already framed is defective or when a new charge becomes necessary after the commencement of trial. But such addition or alteration has to be made before pronouncement of the judgment. (vide para 11 of* ***Jasvinder Saine v. State (Govt. of NCT of Delhi) (2013) 7 SCC 256; Naresh Giri v. State of M.P. (2008) 1 SCC 791 = 2007 (4) KLT 1115****).*

Q.71 Can common intention be formed on the spot at the scene of crime and how to find it out ?

Ans*. Common intention can be formed at the very spot where the occurrence takes place. At times, it is difficult to get direct evidence regarding pre-concert of minds. Common intention can be gathered from the circumstances of the case and the manner in which the assault is carried out. Even in a case where there is no evidence of prior meeting of minds, the sequence of events which unfold during the course of occurrence may clearly indicate the predetermined minds of the accused persons to kill the deceased. (vide para 16 of* ***Ramji Singh v. State of Bihar (2001) 9 SCC 528 = AIR 2001 SC 3853****).*

Q.72 Charge was framed under Sec. 149 I.P.C. and not under Sec. 34 I.P.C. But conviction recorded by applying Sec. 34 I.P.C. Is it correct ?

Ans. *Yes. See* ***Dani Singh v. State of Bihar (2004) 13 SCC 203 = AIR 2004 SC 4570.***

Q.73 Does the non-framing of a charge under Section 149 I.P.C. which creates a distinct and separate offence vitiate the conviction ?

Ans. *No. It is only on proof of evidence of prejudice caused to the accused can the non-framing of charge under Section 149 I.P.C. vitiate the conviction. (See* ***Annareddy Sambhasiva Reddy v. State of A.P. - (2009) 12 SCC 546 = AIR 2009 SC 2661****).*

Q.74 Is it permissible to prosecute directors who were in-charge of and responsible to the company without simultaneously prosecuting the company as well ?

Ans. *No. (vide* ***Aneeta Hada V. Godfather Travels – (2012) 5 SCC 661 = AIR 2012 SC 2795 –*** *3 Judges****; Anil Gupta v. Star India Pvt Ltd. (2014) 10 SCC 373 = AIR 2014 SC 3078; Jitendra Vora v. Bhavana Y. Shah 2015 KHC 4618 = 2015 Cri. L.J 4764 = 2015 (9) SCALE 767****).*

CONTRA: *The earlier view that directors who satisfy the requirement of law can be separately prosecuted even without the junction of the company, is no more good law. The decisions which represent the earlier view are* ***Sheraton Agarwal v. State of M.P. - (1984) 4 SCC 352; State of Punjab v. Kasturi Lal - (2004) 12 SCC 1956 = AIR 2004 SC 4087.***

Q.75 During preliminary hearing under Sec. 227 Cr.P.C. the accused produces certain unimpeachable documents which, if accepted, are sure to discharge the accused. But the Sessions Judge refuses to consider those documents which are of a sterling character. Is it proper ?

Ans. *It is proper. Accused has no right to produce or cause production of any document at the stage of framing charge because what Section 227 Cr.P.C envisages is only a consideration of the record of the case and the documents submitted therewith. (vide* ***State of Orissa v. Debendra Nath Padhi - 2005 (1) SCC 568 = AIR 2005 SC 359 = 2005 (1) KLT 80 –*** *3 Judges).*

Q.76 Is it permissible for the Public Prosecutor at the stage of opening the prosecution case under Section 226 Cr.P.C to inform the Court that since a prosecution witness has been won over by the defence he will not be examining that witness?

Ans. *Yes. If the Public Prosecutor has reliable information to the effect that a prosecution witness has been won over then it may not be possible for him to prove the guilt of the accused by examining that witness. Hence, the prosecutor is at liberty to tell the Court that he may not examine the said prosecution witness.*

See ***Hukam Singh v. State of Rajasthan - 2000 (7) SCC 490 = 2001 Cr.L.J 511; Banti Alias Guddu v. State of M. P. - 2004 (1) SCC 414 = AIR 2004 SC 261.***

Similarly, if a witness refuses to give testimony for fear of his life, that again is a circumstance justifying the public prosecutor in refraining from examining the witness (vide ***Shanker v. State of U.P (1975) 3 SCC 851 = AIR 1975 SC 757****).*

Justice V. Ramkumar,
Former Judge,
High Court of Kerala.

Kochi,
18-07-2020