

## INDIAN EVIDENCE ACT FOR RAJASTHAN JUDICIAL SERVICES EXAMS

### MODULE 3 : THEORY OF RELEVANCY

**GENERAL :** Chapter II of the *Evidence Act* - "*Of the Relevancy of Facts*" - determines the rules on the basis of which the Court considers certain facts as relevant for the trial of a civil or criminal proceeding.

**REASON FOR THIS CHAPTER :** Court should not waste time and effort on matters not important to the enquiry and attention should be on the material facts which have relatively a high probative value. This ensures that parties what evidence should they give in Court of law.

#### UNDERSTANDING WHAT ARE FACTS :

Evidence consists of facts which are relevant or fact in issue.

Section 3 : The expression "facts in issue" means and includes— any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows.

Explanation.— Whenever, under the provisions of the law for the time being in force relating to Civil Procedure, any Court records an issue of fact, the fact to be asserted or denied in the answer to such issue is a fact in issue.

*Illustrations :* A is accused of the murder of B. At his trial the following facts may be in issue:— that A caused B's death; that A intended to cause B's death; that A had received grave and sudden provocation from B; that A, at the time of doing the act which caused B's death, was, by reason of unsoundness of mind, incapable of knowing its nature.





**DEFINE FACTS IN ISSUES. RJS1969.**

**MEANING :** Facts in issue means and includes a fact which either by itself or in connection with other facts would lead to the existence, non existence, nature or extent of any right, liability or disability, asserted or denied.

The fact to be established in order to constitute a fact in issue must be one which leads to the right, liability or disability.

A fact in issue is one which is directly in contention between the parties, *i.e.*, one which the plaintiff (or prosecutor) must establish to win his case, or which the defendant must establish to succeed in some defence which is open to him. A fact in issue is also known by its Latin name — *factum probandum* — or that which is to be proved.

In every legal proceeding, whether civil or criminal, there will be two contesting parties— plaintiff and defendant in civil cases and prosecution and the accused in criminal cases. In a suit or proceeding, the plaintiff or the prosecution alleges certain facts as against the defendant or the accused, as the case may be, who denies them. The core of a criminal case is its facts and, the facts differ from case to case.

**RELEVANT FACT :** The facts which go to prove or disprove the facts in issue and which are covered by Chapter II of the *Evidence Act* are relevant facts.

**THEORY OF RELEVANCY : TWO THEORIES :**

**1<sup>ST</sup> THEORY : THAYER DOCTRINE :** Supported by Jeremy Bentham, Thayer. Accepted in English and United States as the theory of relevancy *i.e.*, all facts with high probative value are relevant unless they are barred by exclusionary rules.

**WHAT IS SAYS :** As per this theory, the Court should treat all logically connected facts which have a high probative value as legally relevant unless there are other rules which bar their admission on policy grounds or other reasons.



**EXAMPLE :** The facts that are excluded from proof could be official secrets or communications between a lawyer and client.

## **2<sup>ND</sup> THEORY : STEPHEN THEORY**

**SUPPORTED BY** James Fitzjames Stephen.

**WHAT IT SAYS :** Under the *Evidence Act*, the rule is that no facts are relevant unless they are expressly declared to be relevant under one or the other provisions of the Chapter on relevancy.

The very definition of the term “relevant” in Section 3 and the provisions of Sections 5 and 165 give a clear and conclusive indication of what is relevant under the *Evidence Act*.

Section 3 defines “relevant” as follows: *One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts.*

Section 3 does not really define what is relevant but only says that facts declared to be relevant under Sections 6 to 55 are relevant.

### **Section 5 : Evidence may be given of facts in issue and relevant facts.—**

**Evidence may be given in any suit or proceeding of the existence of non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.**

***Explanation .—*** This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to Civil Procedure.

#### ***Illustrations***

- ***A*** is tried for the murder of ***B*** by beating him with a club with the intention of causing his death. At ***A***'s trial the following facts are in issue:—***A***'s beating ***B***





**with the club; A's causing B's death by such beating; A's intention to cause B's death.**

- **A suitor does not bring with him, and have in readiness for production at the first hearing of the case, a bond on which he relies. This section does not enable him to produce the bond or prove its contents at a subsequent stage of the proceedings, otherwise than in accordance with the conditions prescribed by the *Code of Civil Procedure*.**

Under Section 5, aforementioned, evidence may be given "of every fact in issue" and of such other facts which are expressly "declared to be relevant", and of no other facts.

Section 5, which like a direction board which directs us to journey in that direction. It provides that evidence may be given of "every fact in issue and of such other facts as are hereinafter declared to be relevant" *i.e.*, by Sections 6 to 55. It is clear that only the facts declared to be relevant under these section should be considered "*and of no others*" as cautioned by the section.

No other considerations of "logical" relevancy or of "probative value" as laid down in the 1<sup>st</sup> theory of Thayer is not applicable under under Indian Evidence Act. This can be further affirmed by section 165 which confers on the judge enormous power to elicit the truth by putting any question, relevant or irrelevant, at any time, of any witness, in any form, or order production of any document *etc.*, but still mandating that "*the judgment must be based upon facts declared by this Act to be relevant, and duly proved*"

**LOGICAL RELEVANCY :** If one fact is connected to the other logically, it is called logical relevancy and it may be based on the following factors, among others: (a) Cause and Effect; (b) Occurrence at the same time (unity of time); (c) Occurrence at the same place (unity of place); (d) Common purpose and design; etc.

**LEGAL RELEVANCY :** Facts legally relevant under the *Evidence Act* means, simply, facts declared to be relevant under Sections 6 to 55 and this is a part of the legislative





A fact however relevant logically, may not be receivable in evidence automatically unless it is declared to be relevant by the Evidence Act.

*Example :* Dead body severed into pieces found in railway track. 1<sup>st</sup> inference : Train ran over him. On closer scrutiny, it can be seen that there is no hemorrhage near the body, which makes the inference of train running over improbable. And can lead to 2<sup>nd</sup> inference that he was killed elsewhere and the dead body was thrown in railway track to make it look like he was ran over by the train. Here the inferences are drawn on the basis of logic based on cause and effect.

and not judicial determination.

Hence, *all logically relevant facts are not legally relevant and all legally relevant facts may not be logically relevant.*

For instance, the Evidence Act permits impeaching the credit of a witness by injuring his character, even though his character is not logically relevant to the fact in issue.

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**ADMISSIBILITY :** Admissibility means that the facts which are relevant are eligible for consideration by the Court. Generally, while the rules relating to relevancy lay down what is included, rules relating to admissibility lay down what is excluded.

The Court will look into the evidence and then decide upon admissibility. Section 136 of the Act lays down the basic guiding principle in this regard.<sup>1</sup>

The essential ingredients of the above section are:

(1) It is the judge who decides the questions of relevancy and admissibility.

(2) When a party proposes to adduce evidence of any fact, the judge may ask the party to clarify “in what manner” the fact would be relevant.

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<sup>1</sup> S. 136. Judge to decide as to admissibility of evidence.— When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant, and not otherwise.





(3)The judge would “admit” the particular adduced fact only if he is satisfied with the answer of the party that it is, indeed, relevant under one or the other provisions of Sections 6 to 55.

Thus the consideration of relevancy comes first and of admissibility comes later and the judge will “admit” the fact only if it is “relevant”.

Sarkar aptly observes: “ Admissibility presupposes relevancy.”

**MEANING OF ‘IN WHAT MANNER’ :** The phrase “in what manner” in Section 136 places responsibility on the judge to ensure that the provisions of the Act regarding relevancy are fully complied with but the burden is placed on the party seeking to adduce evidence to convince the judge that the fact is relevant under any of Sections 6 to 55. As a rule, all legally relevant facts are legally admissible unless they are barred by one or the other section of the Evidence Act.

**EXCLUSIONARY SECTIONS MAKING RELEVANT FACTS INADMISSIBLE :** Those facts may be otherwise relevant under Sections 6 to 55 of the Evidence Act but they are rendered inadmissible by the barring provisions. In other words, the facts may be relevant but inadmissible. Thus, all relevant facts are not necessarily admissible.

- Sections 24, 25 and 26 which are placed in the Chapter II “On Relevancy” in fact provide for “irrelevancy” and bar the admission of certain confessions made under inducement, threat or promise, or made to police officers or made in police custody.
- Sections 122 to 131 which occur in Chapter IX “On Witnesses” also bar admission of facts which are covered by those sections like communications between husband and wife, between advocate and client, official secrets etc.
- In CrPC, Section 162 which bar statements made to the police during investigation from being used in any trial.

Evidence is admissible and should be received by the Court to which it is tendered unless there is a legal reason for its rejection. Admissibility presupposes relevancy. Admissibility also denotes the absence of any applicable rule of exclusion. Facts should not be received in



evidence unless they are both relevant and admissible. The principal rule of exclusion under which evidence becomes inadmissible are twofold. First, evidence of relevant facts is inadmissible when its reception offends against public policy of a particular rule of law. Some matters are privileged from disclosure. A party is sometimes estopped from proving facts and these facts are therefore, inadmissible. The exclusion of evidence of opinion and of extrinsic evidence of the contents of some documents is again a rule of law. Second, relevant facts are subject to recognised exceptions inadmissible unless they are proved by the best or the prescribed evidence.<sup>2</sup>

**RELIABILITY :** Facts passing the test of relevancy and admissibility, finally should pass the test of 'reliability' so that court can admit them as an evidence. As the Supreme Court observed in *Anvar P.V. v. P.K. Basheer and others* , "Genuineness, veracity or reliability of the evidence is seen by the court only after the stage of relevancy and admissibility."

**TEST OF RELIABILITY:** The test of reliability determined objectively on the basis of legally admissible facts. It depends on the Court's own assessment and evaluation of the entire evidence adduced by both the parties to a suit or proceeding.

**DISCRETION OF THE JUDGE :** Relevancy is within the domain of legislative function whereas reliability and proof are within the domain of judicial function. The *Evidence Act* leaves this mental process of evaluation of witnesses and evidence entirely to the judicial expertise and wisdom.

**SUMMARY OF PRINCIPLES UNDER INDIAN EVIDENCE ACT:** All logically relevant facts are not legally relevant. But no logically relevant facts are admissible unless they are legally relevant under any of the Sections 6 to 55 . No legally relevant facts are also admissible if they are barred by any of the exclusionary provisions contained in (a) Chapter on relevancy, or (b) other provisions of Evidence Act or (c) of CrPC or other statutes.

## SECTION 6 : RELEVANCY OF FACTS FORMING PART OF SAME TRANSACTION

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<sup>2</sup> *State of U.P. v. Raj Narain*, (1975) 4 SCC 428.



**Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.**

***Illustrations***

- (a) **A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.**
- (b) **A is accused of waging war against the Government of India by taking part in an armed insurrection in which property is destroyed, troops are attacked and gaols are broken open. The occurrence of these facts is relevant, as forming part of the general transaction, though A may not have been present at all of them.**
- (c) **A sues B for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are relevant facts, though they do not contain the libel itself.**
- (d) **The question is, whether certain goods ordered from B were delivered to A. The goods were delivered to several intermediate persons successively. Each delivery is a relevant fact.**

**What is the principle of res gestae 2m. RJS 2011.**

**CONCEPT OF RES GESTAE :** Section 6 deals with relevancy of "*facts forming part of the same transaction*". This principle is based on the English doctrine of *res gestae* and the Latin phrase means "things done". The essence of this doctrine is that a fact which though not in issue, is so connected with the fact in issue, 'as to form part of the same transaction', becomes relevant by itself.





**APPLICABILITY :** Section 6 applies to civil as well as criminal proceedings as is evident from the illustrations to the section. While the first two illustrations deal with criminal cases the other two deal with civil cases.

**DEFINITION :** “The *res gestae* may be defined as those circumstances which are the automatic and undersigned incidents of a particular litigated fact and which are admissible when illustrative of such facts...They are facts talking for themselves and not what people say when talking about the facts.<sup>3</sup> Example : A woman, who was said to be abducted, travelled in a car for a certain distance without for calling for any help; the accused was acquitted of rape and abduction charges.<sup>4</sup>

**PRINCIPLES OF RES GESTAE :** The principles relatable to the rule of *res gestae* are four in number:

1. The declarations (oral or written) must relate to the act which is in issue or relevant thereto; they are not admissible merely because they accompany an act. Moreover the declarations must relate to and explain the fact they accompany, and not independent facts previous or subsequent thereto unless such facts are part of a transaction which is continuous.
2. The declarations must be substantially contemporaneous with the fact and not merely the narrative of a past.
3. The declaration and the act may be by the same person, or they may be by different persons, e.g., the declarations of the victim, assailant and by- standers. In conspiracy, riot and the declarations of all concerned in the common object are admissible.
4. Though admissible to explain or corroborate or to understand the significance of the act, declarations are not evidence of the truth of the matters stated.

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<sup>3</sup> Kameshwar Prasad v. Rex.

<sup>4</sup> Krishan Kumar Malik v. Haryana (2011)



**PART OF TRANSACTION** : “Hearsay statements to be admissible as substantive evidence of the truth of the facts stated therein must themselves be ‘part of the transaction’ and not merely uttered in the course of the transaction.”<sup>5</sup>

**SHOULD BE CONTEMPORANEOUS** : Section 6 of the Act has an exception to the general rule whereunder hearsay evidence becomes admissible. But as for bringing such hearsay evidence within the ambit of Section 6, what is required to be established is that it must be almost contemporaneous with the acts and there could not be an interval which would allow fabrication. In other words, the statements said to be admitted as forming part of *res gestae* must have been made contemporaneously with the act or immediately thereafter.

### EXCEPTION TO HEAR SAY RULE

**The doctrine of *res gestae* is considered to be an exception to the hearsay rule. Hearsay is sometimes classified into two kinds, viz., (a) Individual Hearsay and (b) Composite Hearsay. Illustration (a) to Section 6 says: “A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.” If A or B deposes as to what he said at the occurrence, that would be direct evidence but the deposition of the witness as to what A or B said is hearsay. If a witness deposes in the Court as to what was said by A or B, it is individual hearsay and where he testifies about what a group of by-standers have said, it is composite hearsay.**

In *R. v. Lillyman* : a statement made by a raped woman after the ravishment was held to be not part of the *res gestae* on account of some interval of time lapsing between the act of rape and the making of the statement. In *Venkateshan v. State, 1997 Cr.LJ 3854*, wherein

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<sup>5</sup> Hadu v. State AIR 1951 Ori 53 . A transaction may consist of not one fact but a set of facts which are connected to each other and constitute a whole. A “transaction” does not consist of all kinds of facts, events or occurrences but only those which are the outcomes of exertion of human will whether they fall under “state of things” or “acts” to which the law attaches a label as, for instance, a “contract”, “tort” or an “offence”.



Madras High Court held, that in a murder case where the accused who had assaulted the deceased, had made a statement about the assault to the brother of the deceased, within half an hour of the act, the evidence of the brother was held to be “res gestae”, and therefore, admissible under Section 6 of the Evidence Act.

In *Gentela Vijayavardhan Rao case*<sup>6</sup>, a bus was set on fire which resulted in the death of 23 passengers. Statements of two seriously injured fellow passengers were recorded by the Magistrate as it was thought that they might succumb to their injuries, in which event their statements could be pressed into service under Section 32 of the Evidence Act. Fortunately, they survived. But while answering the question whether those statements could now be relied upon under Section 6, this Court found that there was appreciable interval between the criminal act and the recording of their statements by the Magistrate and as such the statements could not be relied upon with the aid of Section 6.

In *Krishan Kumar Malik vs. State of Haryana*, (2011) 7 SCC 130, are relevant on this aspect :  
“...for bringing such hearsay evidence within the ambit of Section 6, what is required to be established is that it must be almost contemporaneous with the acts and there could not be an interval which would allow fabrication.”<sup>7</sup> In other words, to be relevant under Section 6 of the Evidence Act, such statement must have been made contemporaneously with the fact in issue, or at least immediately thereupon, and in conjunction therewith. If there is an interval between the fact in issue, and the fact sought to be proved, then such statement cannot be described as falling in the “res gestae” concept.<sup>8</sup>

The statement of a witness who came to the scene of the occurrence after it was over and did not see the accused attack the deceased but learnt about it from the eye-witnesses. This statement is not relevant under section 6; however it could be used for the purpose of corroboration under Section 157 of the Evidence Act.<sup>9</sup>

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<sup>6</sup> *Gentela Vijayavardhan Rao v. Andhra Pradesh* (1996) 6 SCC 241

<sup>7</sup> *Javed Alam v. State of Chhattisgarh* ((2009) 6 SCC 450), it was held as follows: “Section 6 of the Evidence Act is an exception to the rule of evidence that hearsay evidence is not admissible. The test for applying the rule of res gestae is that the statement should be spontaneous and should form part of the same transaction ruling out any possibility of concoction.

<sup>8</sup> *State of Maharashtra v. Kamal Ahmed Mohammed Vakil Ansari and Ors.* [AIR 2013 SC 1441].

<sup>9</sup> *Mukhtiar Singh v. State of Punjab*, AIR 2009 SC 1854



**SECTION 7 : Facts which are the occasion, cause or effect of facts in issue.—**

**Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.**

***Illustrations***

- (a) **The question is, whether A robbed B. The facts that, shortly before the robbery, B went to a fair with money in his possession, and that he showed it or mentioned the fact that he had it, to third persons, are relevant.**
- (b) **The question is, whether A murdered B. Marks on the ground, produced by a struggle at or near the place where the murder was committed, are relevant facts.**
- (c) **The question is, whether A poisoned B. The state of B's health before the symptoms ascribed to poison, and habits of B, known to A, which afforded an opportunity for the administration of poison, are relevant facts.**

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Facts which are considered to be relevant under Section 7 :

- are the occasion,
- cause or effect, immediate or otherwise, of facts in issue or relevant facts; or
- which constitute the state of things under which they happened; or
- which provided an opportunity for their occurrence or transaction.

Section 7 of the Evidence Act makes relevant, facts which are the occasion or which afford an opportunity for the occurrence of the transaction.

**OCCASION :** In this context “occasion” means to cause or provide the circumstances for the occurrence.

**CAUSE AND EFFECT :** The concept of “cause and effect” will bring within the reach of this section a lot of facts that are relatable to each other on the basis of logic and induction.





Facts unearthed by investigation into various causes of death (homicidal or suicidal) and effects of poisons on human body and so on can be brought under this section. See the example for *logical relevancy*.

The Post-mortem Doctor is an Expert under *Section 45 of the Evidence Act* and based on the injuries found by him on the body, he gives his opinion about the cause of the death. This is relevant under Section 7 of the Evidence Act. He traces the cause from the effect. In other words, the fact-in-issue is, whether "A" murdered the deceased and the effect of murder is the death of the deceased. From the dead body, by a process of reverse engineering, the Post-Mortem Doctor decides the cause of death, that too 'in his opinion'.

**OPPORTUNITY :** In criminal cases where the prosecution case depends either partly or wholly on circumstantial evidence, Courts insist on proof of the fact that the accused had not only opportunity but had exclusive opportunity to commit the crime.

In the case of *Shanmughan v. Kerala*, the husband was charged with the murder of his wife during night in the bed room by inflicting injuries and forcibly administering cyanide poison. Holding that the prosecution has properly discharged its burden of proof based entirely on circumstantial evidence, the Court based its conclusion on opportunity to commit the crime and observed that only the husband could have administered the poison.

*Kutuhel Yadav v. State of Bihar*, 1954 Cri LJ 1802 : Where there was no direct evidence as to the murder of the deceased, accused was one of the persons suspected of the crime, and the established facts showed that the accused had not only a strong motive but also the opportunity of killing the deceased and that he was insistent on cremating the dead body as early as possible.

As circumstantial evidence relating to opportunity depends to a large extent on interpretation of facts, it can lead to very misleading inferences and conclusions and it is not safe to convict a person solely on that count.



**SECTION 8 : Motive, preparation and previous or subsequent conduct.—**

Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact. The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

*Explanation 1.*—The word “conduct” in this section does not include statements, unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act.

*Explanation 2.*—When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant.

***Illustrations***

- (a) A is tried for the murder of B. The facts that A murdered C, that B knew that A had murdered C, and that B had tried to extort money from A by threatening to make his knowledge public, are relevant.
- (b) A sues B upon a bond for the payment of money. B denies the making of the bond. The fact that, at the time when the bond was alleged to be made, B required money for a particular purpose, is relevant.
- (c) A is tried for the murder of B by poison. The fact that, before the death of B, A procured poison similar to that which was administered to B, is relevant.
- (d) The question is, whether a certain document is the Will of A. The facts that, not long before the date of the alleged Will, A made inquiry into matters to which the provisions of the alleged Will relate, that he consulted *vakils* in reference to making the Will, and that he caused drafts of other Wills to be prepared of which he did not approve, are relevant.
- (e) A is accused of a crime. The facts that, either before or at the time of, or after





the alleged crime, A provided evidence which would tend to give to the facts of the case an appearance favourable to himself, or that he destroyed or concealed evidence, or prevented the presence or procured the absence of persons who might have been witnesses, or suborned persons to give false evidence respecting it, are relevant.

- (f) The question is, whether A robbed B. The facts that, after B was robbed, C said in A's presence- "the police are coming to look for the man who robbed B," and that immediately afterwards A ran away, are relevant.
- (g) The question is, whether A owes B rupees 10,000. The facts that A asked C to lend him money, and that D said to C in A's presence and hearing—"I advise you not to trust A, for he owes B 10,000 rupees," and that A went away without making any answer, are relevant facts.
- (h) The question is, whether A committed a crime. The fact that A absconded after receiving a letter warning him that inquiry was being made for the criminal, and the contents of the letter, are relevant.
- (i) A is accused of a crime. The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant.
- (j) The question is, whether A was ravished. The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which, and the terms in which, the complaint was made, are relevant.

The fact that, without making a complaint, she said that she had been ravished is not relevant as conduct under this section, though it may be relevant as a dying declaration under section 32, clause (1), or as corroborative evidence under section 157 .

- (k) The question is, whether A was robbed. The fact that, soon after the alleged robbery, he made a complaint relating to the offence, the circumstances under





which, and the terms in which, the complaint was made, are relevant.

The fact that he said he had been robbed without making any complaint, is not relevant, as conduct under this section, though it may be relevant as a dying declaration under section 32, clause (1), or as corroborative evidence under section 157.

**Decide the relevancy giving reasons.**

**The question is whether A robbed B.**

**The facts that after B was robbed, C said in A's presence, "The police are coming to look for the man who robbed B" and that immediately afterwards A ran [RJS 1991] away.**

**See illustration(f)**

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Section 8 makes the following relevant:

- a) Motive
- b) Preparation and
- c) Previous or Subsequent Conduct

**MOTIVE : WHEN RELEVANT :** Motive means that which moves a person to act in a particular way. It is different from intention.

Motive", by definition, "is the moving power which impels action for a definite result, or to put it differently, "motive" is that which incites or stimulates a person to do an act."

In criminal law, the maxim is *actus non facit reum nisi mens sit rea*—no act (actus reus: Objective element) is an offence without guilty mind (mens rea: Subjective element). It is, as a rule, for the prosecution to prove both the actus reus and mens rea.





Despicable motive behind an act or omission is not punishable if the law does not punish the same. However laudable it may be, the motive cannot be taken as a justification for the commission of the crime as if the same is punishable by law. Example ,if a person commits the theft of a loaf of bread from a bakery to feed his starving children, his “immediate intention” or intention proper is to commit theft but his motive or ulterior intention is to feed his children. In this example, the ulterior intention (feeding the kids) is innocent but the immediate intention (stealing) is criminal. But in Section 8 the word “motive” is used in a generic sense and includes ulterior intention as well as immediate intention. Absence of motive would not in any manner destabilize the prosecution case. Where there is clear proof of guilty act, proof of motive is superfluous, and where there is no proof of guilt, proof of motive is useless.

**PREPARATION : WHEN RELEVANT :** Preparation consists in devising or arranging the means or measures necessary for the commission of the offence. It consists of a design or plan or blueprint for doing an act. Thus, a person who intends to kill another might procure a poison and study the food habits of the intended victim for the administration of the poison. Preparation per se is not punishable under the IPC except in cases of preparing to wage war against the Government of India under Section 122 or to commit dacoity under Section 399 of IPC etc...

**CONDUCT : WHEN RELEVANT :** Conduct would include not only a single act or omission but also a set of acts and omissions, and can generally be taken to mean ‘behavior’. Section 8 also makes “conduct” relevant. The conduct, in order to be admissible under Section 8 of the Evidence Act, 1872 must be such that it has close nexus with a fact in issue or relevant fact. Explanation 1 to Section 8 makes it clear that the mere statements as distinguished from acts do not constitute “conduct” unless those statements “accompany and explain acts other than statements”. Conduct which destroys the presumption of innocence can alone be considered as material.<sup>10</sup> In *Amina v Hassn Koya*, where concealment of pregnancy from husband was alleged, husband’s conduct at the time of marriage and thereafter was held to be relevant.

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<sup>10</sup> *Anant Chintaman Lagu v. State of Bombay*, AIR 1960 SC 500, 505.



**S. 9. Facts necessary to explain or introduce relevant facts.—**

Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose.

***Illustrations***

- (a) The question is, whether a given document is the Will of A. The state of A's property and of his family at the date of the alleged Will may be relevant facts.
- (b) A sues B for a libel imputing disgraceful conduct to A; B affirms that the matter alleged to be libellous is true.

The position and relations of the parties at the time when the libel was published may be relevant facts as introductory to the facts in issue.

The particulars of a dispute between A and B about a matter unconnected with the alleged libel are irrelevant, though the fact that there was a dispute may be relevant if it affected the relations between A and B.

- (c) A is accused of a crime. The fact that, soon after the commission of the crime, A absconded from his house, is relevant under Section 8, as conduct subsequent to and affected by facts in issue.

The fact that, at the time when he left home he had sudden and urgent business at the place to which he went, is relevant, as tending to explain the fact that he left home suddenly.

The details of the business on which he left are not relevant, except in so far as they





are necessary to show that the business was sudden and urgent.

- (d) A sues B for inducing C to break a contract of service made by him with A. C, on leaving A's service, says to A-"I am leaving you because B has made me a better offer." This statement is a relevant fact as explanatory of C's conduct, which is relevant as a fact in issue.
- (e) A, accused of theft, is seen to give the stolen property to B, who is seen to give it to A's wife. B says as he delivers it-"A says your are to hide this." B's statement is relevant as explanatory of a fact which is part of the transaction.
- (f) A is tried for a riot and is proved to have marched at the head of a mob. The cries of the mob are relevant as explanatory of the nature of the transaction.

The section makes the following facts relevant: The facts

- a) which are necessary to explain or introduce a fact in issue or relevant fact; or
- b) which support or rebut an inference suggested by a fact in issue or relevant fact; or
- c) which
  - establish the identity of any thing or person whose identity is relevant, or
  - fix the time or place at which any fact in issue or relevant fact happened, or
- d) which show the relation of parties by whom any such fact was transacted.

### ***Introductory and Explanatory Facts***

Facts which show the names and identity of persons, their background and position in life and the circumstances in which transactions like a sale or will are gone through may be necessary to introduce and explain facts in issue for their proper understanding.

Individuals, events or things cannot be suddenly introduced in a Court of law without providing the Court with the necessary backdrop and connection to the case on hand.

Illustration (c) is a good example of the scope, purpose and limits of Section 9. If A is accused of a crime and is said to have absconded from his house, the inference would be that he was guilty. But the fact that he had left his home because he had some sudden and





urgent business explains his conduct by placing a different interpretation of his conduct. The details of his business are not relevant except to the limited extent that they explain that the business was urgent. Thus, if the accused has gone to attend on his mother who became suddenly seriously sick, the details of mother's ill health are irrelevant except to the extent they show that it was sudden and urgent.

***Facts which Support or Rebut an Inference*** : The facts relevant under this category may be somewhat similar to those relevant under Section 11 which makes facts "inconsistent" with any fact in issue or relevant fact or which make their existence or non-existence "highly probable or improbable".

In illustration (c) to Section 9, referred to above, the fact that A had gone on an urgent business "rebut" the inference of his guilt arising out of the assumption that he was absconding and is also "inconsistent" with his "absconding" and renders the inference of his guilt "highly improbable" within the meaning of Section 11.

### ***Facts which establishing identity***

Identification proceedings are facts which establish the identity of an accused person as the doer of a particular act, and would be relevant under Section 9; but only if evidence of such identification is given by the witness. When such evidence is given, the Magistrate can corroborate him.

The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact.

An identification parade is not mandatory nor can it be claimed by the suspect as a matter of right. The purpose of pre-trial identification evidence is to assure the investigating



agency that the investigation is going on in the right direction and to provide corroboration of the evidence to be given by the witness or victim later in court at the trial. If the suspect is a complete stranger to the witness or victim, then an identification parade is desirable unless the suspect has been seen by the witness or victim for some length of time.

However, if the suspect is known to the witness or victim or they have been shown a photograph of the suspect or the suspect has been exposed to the public by the media no identification evidence is necessary. Even so, the failure of a victim or a witness to identify a suspect is not always fatal to the case of the prosecution.

The identification of the accused either in a test identification parade or in court is not a sine qua non in every case if from the circumstances the guilt is otherwise established. Many a time, crimes are committed under the cover of darkness when none is able to identify the accused. The commission of a crime can be proved also by circumstantial evidence.

#### **INTERPLAY BETWEEN SECTION 9 OF IEA AND SECTION 164 CRPC**

**Section 9 of the Evidence Act and S. 164, CrPC deal with different situations: Section 164 of the Code of Criminal Procedure prescribes a procedure for the Magistrate recording statements made by a person during investigation or before trial; Section 9 of the Evidence Act, on the other hand, makes certain facts which establish the identity of a thing as relevant evidence for the purpose of identifying, that thing.**

**If a statement of a witness recorded by a Magistrate in derogation of the provisions of S. 164 will go in as evidence under S. 9 of the Evidence Act, the object of S. 164 of the said Code will be defeated. It is, therefore, necessary to resort to the rule of harmonious construction so as to give full effect to both the provisions.**

**If a Magistrate speaks to facts which establish the identity of anything, the said facts would be relevant within the meaning of S. 9 of the Evidence Act; but if the Magistrate seeks to prove statements of a person not recorded in compliance with the mandatory provisions of S. 164 of the Code of Criminal Procedure, such part**





**of the evidence though it may be relevant within the meaning of S. 9 of the Evidence Act, will have to be excluded. By such a construction of the provisions a satisfactory solution could be evolved.**

**Neither the Evidence Act nor the Code of Criminal Procedure prohibits a Magistrate from deposing to relevant facts within the meaning of S. 9 of the Evidence Act. But any statement made to him by any person not recorded as per section 165 would be inadmissible.**

**S. 10. Things said or done by conspirator in reference to common design .—**

Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

*Illustration* : Reasonable ground exists for believing that A has joined in a conspiracy to wage war against the Government of India. The facts that B procured arms in Europe for the purpose of the conspiracy, C collected money in Calcutta for a like object, D persuaded persons to join the conspiracy in Bombay, E published writings advocating the object in view at Agra, and F transmitted from Delhi to G at Kabul the money which C had collected at Calcutta, and the contents of a letter written by H giving an account of the conspiracy, are each relevant, both to prove the existence of the conspiracy, and to prove A's complicity in it, although he may have been ignorant of all of them, and although the persons by whom they were done were strangers to him, and although they may have taken place before he joined the conspiracy or after he left it.





**When can the acts, statements and writings of a conspirator be used against the other conspirators? RJS 2011. 3m**

**MEANING OF CRIMINAL CONSPIRACY :** Criminal conspiracy is a partnership in agreement and there is in each conspiracy a joint or mutual agency for the execution of a common object which is an offence or an actionable wrong. When two or more persons enter into a conspiracy any act done by any one of them pursuant to the agreement is, in contemplation of law, the act of each of them and they are jointly responsible therefor. This means that everything said, written or done by any of the conspirators in execution of or in reference to their common intention is deemed to have been said, done or written by each of them.

**KEY ELEMENTS OF SECTION 10 OF INDIAN EVIDENCE ACT**

- (1) **there is a reasonable ground to believe that:**
  - **two or more persons have**
  - **conspired together to commit an offence or an actionable wrong**
- (2) **anything said, done or written by any one of such persons**
- (3) **in reference to their common intention,**
- (4) **after the time when such intention was first entertained by any one of them**
- (5) **is relevant:**
  - **as against each of the persons believed to be so conspiring,**
  - **for the purpose of proving the existence of the conspiracy and**
  - **for the purpose of showing that any such person was a party to it.**

**TRACING THE ORIGIN :** The concept of vicarious liability was uncommon to criminal law. The basic principle which underlies Section 10 of the Evidence Act is the theory of agency [and Partnership] and hence every conspirator is an agent of his associate in carrying out the object of the conspiracy (*State of Gujarat v. Mohd. Atik*). Section 10 permits anything said, done or written by any one of such persons in reference to their common intention to be recorded as a relevant fact as against each of the persons believed to have so conspired.





This was done to suppress the voice of independence by freedom fighters against British. Therefore, the section 120-A of IPC and Sec.10 of IEA were wide in nature.

**RULE OF SUBSTANTIVE LAW :** Making one man criminally liable for the actions of another is not a rule of evidence, rather a principle of substantive law. Two exceptions to this rule under IEA are (1) Section 10 (Conspiracy), and (2) Section 30 which permits proof of confession of an accused against other co-accused if its conditions are satisfied.

**QUANTUM OF PROOF :** The only condition for application of the rule in Section 10 is that there must be 'reasonable ground to believe that two or more persons have conspired together to commit an offence.'

It is sufficient to make out a prima facie case of conspiracy between the conspirators in reference to their common intention and if once the same is proved, anything stated or done during the period of conspiracy by one of the conspirators could be used against them by operating Section 10 of the Evidence Act.

In *State (NCT of Delhi) Vs. Navjot Sandhu @ Afsan Guru* , making exhaustive reference to several decisions on the point, including in *State Through Superintendent of Police, CBI/SIT Vs. Nalini & Ors.* , Venkatarama Reddi, J. observed thus:

"Mostly, the conspiracies are proved by the circumstantial evidence, as the conspiracy is seldom an open affair. Usually both the existence of the conspiracy and its objects have to be inferred from the circumstances and the conduct of the accused (per Wadhwa, J. in Nalini's case at page 516). The well-known rule governing circumstantial evidence is that each and every incriminating circumstance must be clearly established by reliable evidence and "the circumstances proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible." (*Tanviben Pankajkumar case* , SCC page 185, para 45). G.N. Ray, J. in *Tanibeert Pankajkumar* observed that this Court should not allow the suspicion to take the place of legal proof."





Thus, it is manifest that the meeting of minds of two or more persons for doing an illegal act or an act by illegal means is sine qua non of the criminal conspiracy but it may not be possible to prove the agreement between them by direct proof. Nevertheless, existence of the conspiracy and its objective can be inferred from the surrounding circumstances and the conduct of the accused.

**WHEN THE EVIDENCE OF CO-CONSPIRATOR IS NOT APPLICABLE :** A statement made by a conspirator before the commencement of the conspiracy is not admissible against the co-conspirator under Section 10 of the Evidence Act. Similarly, a statement made after the conspiracy has been terminated on achieving its object or it is abandoned or it is frustrated or the conspirator leaves the conspiracy in between, is not admissible against the co-conspirator. Any statement made by any accused after his arrest as a confession or otherwise will not fall within the ambit of Section 10 of the Evidence Act.<sup>11</sup> Fixing the period of conspiracy is, thus, important as provisions of Section 10 would apply only during the existence of the conspiracy.<sup>12</sup>

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**S. 120A. Definition of criminal conspiracy.(INDIAN PENAL CODE)—When two or more persons agree to do, or cause to be done—**

- (1) **an illegal act, or**
- (2) **an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy.**

The basic ingredients of the offence of criminal conspiracy are: (i) an agreement between two or more persons; (ii) the agreement must relate to doing or causing to be done either (a) an illegal act; or (b) an act which is not illegal in itself but is done by illegal means. It is, therefore, plain that meeting of minds of two or more persons for doing or causing to be done an illegal act or an act by illegal means is sine qua non of criminal conspiracy.

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<sup>11</sup> State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600.

<sup>12</sup> State of Tamil Nadu Vs. Nalini reported in (1999) 5 SCC 253



The scope of the definition of conspiracy is, in effect, identical both under *Section 10 of Evidence Act* and *Section 120A of IPC*.

**S. 107. Abetment of a thing.—A person abets the doing of a thing, who—  
... Secondly.—Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; ...**

Hence, a person can commit abetment of a thing by conspiring with one or more persons for the doing of that thing by an overt act of commission or omission in (a) pursuance of that conspiracy and (b) in order to the doing of that thing. So, this clause deals with abetment of the commission of an offence by participation in a conspiracy. If A engages in a conspiracy with B and C to kill D, A is said to abet the murder if an overt act is done in pursuance thereof.

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