CHAPTER-V

CONSENT NOT EXONERATING FROM
THE CRIMINAL LIABILITY (Type-Three)
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(Acts which are offences independently of harm caused)

Introduction

There can be situation when consent has been taken still the act is an offence because the act is an offence to the public. Causing miscarriage (when the miscarriage of boy or girl is prohibited) is an offence to the public also an offence to the foetus and also an offence against the woman if she has not consented to. But in a case when she has given consent then the act remains offence against the general public because causing miscarriage is independently an offence irrespective of the consent of the lady. Such principle has been incorporated in Section 91 of IPC which is an exception against Sections 87, 88 and 89. Offences against public safety, morals etc are also called offences independently of the harm caused. Carnal relations between same sex is also one of such example where consent can not exonerate from Cri. Liability as per sec. 377.

There are another area in IPC where miscarriage is punished i.e. Sections 312-316. If consent has been taken of woman still it is punishable (Section 312) provided the miscarriage was caused in good faith for saving the life of the woman. If consent was not taken the punishment is provided higher (Section 313). Similarly if death is caused of the woman while causing miscarriage, the consent of the woman will decide the quantum of punishment (Section 314) whereas act done with intent to prevent child being born alive or to cause it to die after birth (Section 315) and causing death of quick unborn child (Section 316) are made punishable on different punishments on the basis of determining questions of good faith, saving life of the woman and consent. Now we will discuss the independent offences deeply with angle to see the
effect of consent on the criminal liability against the offences under Sections 91, 312-316.

Independent offences (Consent Meaningless)

(i) Public Offence and Consent –

Section 91. Exclusion of acts which are offences independently of harm caused :- The exceptions in Sections 87, 88 and 89 do not extend to acts which are offences independently of any harm which they may cause, or be intended to cause, or be known to be likely to cause, to the person giving the consent, or on whose behalf the consent is given.

Analogous law:– The section is intended to explain the exceptions in which the operation of consent in condonation of crime is defined. It lays down that the condonation will not extend beyond the harm caused and the offence that the causing of that harm may constitute. The section is recognition of the two great sub-division of crime, public offences and private offence. Such are the offences against the State or its various departments or its currency or revenue offences intended to produce public commotion or disturbance, acts intended to interfere with public convenience or to corrupt public morals which are all punishable regardless of the consent of any person who may have been incidentally affected by them. So the consent of an individual to obscene publications, indecent exhibitions and public nuisances has no effect on the criminal responsibility of the persons guilty of them. So again, in cases of affrays and riots consent of the individuals harmed thereby is no answer to the crime which affects the society generally. Duels and prize-fights afford other instances of offences in which the measure of criminality is not the harm consented to or caused to an individual.

Miscarriage :- The case of offence of miscarriage given in the illustration furnishes another, though not a very apt, example of the operation of the rule.
With regard to this offence, there are two theories. It is, on the one hand, contended that the offence, partakes of its public character on account of the injury caused to the child, and as affecting society, by preventing the increase of its population. It is, on the other hand, said that the injury both to society, and the child, is too remote, to be penal, but the unsoundness of this view is apparent, since an operation which is both dangerous to the life of the mother as well as deterrent to the progress of population cannot be regarded but as unlawful, regardless of the consent of the mother.

**Compoundable and non-compoundable offences** - The same policy underlies the classification of offences made in the Code of Criminal Procedure between “non-compoundable” and “compoundable” offences, the former being offences in which the consent of the individual directly affected in insufficient to exculpate the offender, the latter being those in which the party wronged is permitted to exonerate the wrong-doer.

The illustration quotes the expression, “by reason of such harm”, used in Sections 87, 88 and 89 in a way which would seem to suggest that this section is naturally implied in those sections which it is not. If it were, the illustration would have been sufficient without the section.

**Where Consent in Condonation of Crime does not Apply** - Section 91 of the Penal Code serves as a corollary to Sections 87, 88 and 89.

This section explicitly states that consent will only condone the act causing harm to the person giving the consent, which will otherwise be an offence. Acts which are offences independently of any harm which they may cause will not be covered by consent given under Sections 87, 88 and 89. Instances of such acts are: causing miscarriage, public nuisance, offences against public safety, morals and the like. Huda\(^1\) observes:

\(^1\) Huda, p. 338.
The principle is clear; consent may wipe off an injury to the person consenting, but if the gravemen of the offence is not the injury to the consenting party but something else, the consent can have no effect on the offence.

This principle is evident by the illustration appended to the section itself. The causing of miscarriage, as is clear, is not an injury to the woman alone. The child in the womb has also certain rights for certain purposes and causing of a miscarriage is an offence against the child as well. Therefore, the consent given by the mother is of no avail in such an offence. Moreover, as we have studied in the beginning of this topic, although most of the public offences are offences against individuals, yet the consent given by the individuals in these cases is not of any avail. Offences of bigamy and unnatural offences may be cited as illustrations. We need not repeat that in purely public offences the question of consent does not arise at all. It may be observed that the same policy underlies the Code of Criminal Procedure while classifying offences into compoundable and non-compoundable offences. In the former, the consent of the injured is enough to wipe out the injury and thus exonerate the offender, while in the latter it is not possible. Similarly, under American law also condonation and settlement is permissible only in connection with misdemeanours and crimes of a lesser degree.

This section says in explicit terms that consent will only condone the act causing harm to the person giving the consent which will otherwise be an offence. If the act is an offence independently of the harm which it has caused
then the doer will not be protected by the consent given. The word 'harm' in this section means physical injury.\textsuperscript{2}

\textbf{Acts which are offences independently of harm caused:—} Section 91 is a proviso to Sections 87, 88 and 89 of the Code. Section 91 states that protection accorded under Sections 87, 88 and 89 to a person on the basis of consent would not apply to acts which are offences independently of any harm caused, or intended to be caused, or known to be likely to be caused to the person giving consent, or on whose behalf consent is given. For example causing a miscarriage is not only an injury to the woman alone, but an offence against the life of the child as well. Hence the mother's consent will not be taken as the child's consent and the person causing a miscarriage will not be absolved from prosecution.

Consent may wipe off an injury to the person concerned, but not an injury caused to someone else, who never consented to it,\textsuperscript{3} again, consent will not condone a man from criminal prosecution in respect of offences against the State, public health, safety, convenience, decency, morality and the like. Thus a man will not be protected from criminal prosecution for obscene publications, indecent exhibition and public nuisance, etc., even if the act is performed with the consent of the person. Because such offences affect the State and society in general. No two individuals can agree to violate such provisions. It is only in cases of offences against the human body and property that consent might absolve a person from criminal liability provided it is not against public policy and do not violate the provisions of law.

This section says that consent will only condone the act causing harm to the person giving the consent which will otherwise be an offence. If the act


\textsuperscript{3} Ademma, (1886) \textit{ILR} 9 Mad 369. A woman was charged for causing herself to miscarry.
is an offence independently of the harm which it has caused then the doer will not be protected by the consent given.

The accused professed to give medical and surgical advice for money. The prosecutrix, a girl of nineteen, consulted him with respect to illness from which she was suffering. He advised that a surgical operation should be performed, and under pretence of performing it, had carnal connection with the prosecutrix. She submitted to what was done under the belief that he was merely treating her medically and performing a surgical operation. It was held that the accused was guilty of rape.4

Now we will discuss the role of consent in making liable a person causing miscarriage or has caused death while causing miscarriage under the following Sections viz. 312-316. Interestingly to note here that consent of the woman does not exonerate the wrongdoer from criminal liability (Section 212) but if the miscarriage is caused without consent the quantum of sentence is increased (Section 213). We will discuss the miscarriage in detail with primarily to known the law of miscarriage in foreign countries.

Law of abortion in other countries :- In brief the law relating to abortion in countries of Indian sub-continent, Asian Region and United Kingdom are being discussed below to give an idea about the attitude of the people, influence of religion and various other social, economic and moral factors that influence the law makers in a country to permit or not to permit abortion with qualifications, etc.

The countries, can broadly be classified into four categories, viz:

First, Countries that do not permit abortion under any circumstances are Indonesia,5 Philippines6 and Ireland7 where termination of pregnancy is illegal and punishable under the law.

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4 Flattery, (1877)2 QBD 410.
5 Penal Code of Indonesia, article 346-9.
6 Penal Code of Philippines, article 256-9.
7 Abortion Act, sec. 7(2).
Second, Countries like Bangladesh, Pakistan, Sri Lanka, and Malaysia permit abortion only to save the life of the mother.

Third, Countries like India, United Kingdom, and United States of America permit induced abortion under prescribed conditions as provided under the abortion legislations of the concerned country; and

Fourth, Countries like Singapore which permit abortion at the discretion of the woman with no restriction of any sort except that it should be performed by a registered medical practitioner in a hospital or a clinic approved by the government.

(1) Abortion in Pakistan and Bangladesh.— In Pakistan and Bangladesh 'causing miscarriage' is punishable under Section 312 of the respective Penal Codes, as in the case of India. The relevant provisions are contained in Sections 312 to 316 of the Penal Codes, as in the case of India. The relevant provisions are contained in Sections 312 to 316 of the Penal Codes of Pakistan and Bangladesh. No serious efforts have been made to liberalise the law of abortion in these countries to control the unprecedented explosion of population.

In Bangladesh the population has crossed 150 million with the highest density of population per square kilometre in the world. Pakistan is similarly facing a population crisis and is unable to control its rise. Though the policy makers are aware of the need for liberalisation of the law of abortion, it is difficult for the governments in these countries to go ahead with any

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8 Bangladesh Penal Code, sec. 312.
9 Pakistan Penal Code, sec. 312.
10 Penal Code of Ceylon, sec. 303.
11 Malaysia Penal Code, exception to sec. 312.
12 Medical Termination of Pregnancy Act, 1971, sec. 3.
14 Roe v. Wade, 410 US 113 at 139.
15 Termination of Pregnancy Act, sec. 3(1).
16 Both Pakistan and Bangladesh Penal Codes have incorporated the provisions of the Indian Penal Code.
legislation permitting abortion even in limited cases because of the great opposition by fundamentalists and religious fanatics.

(2) **Abortion in Sri Lanka:** In Sri Lanka abortion is punishable under Sections 303 to 307,\(^\text{17}\) of the Ceylon Penal Code of 1885. The provisions are similar to those contained in Sections 312 to 315 of Indian Penal Code. In Sri Lanka also abortion is permissible only to save the life of the mother as in the case of Malaysia, Pakistan and Bangladesh. It appears that no serious efforts have been made to liberalise the law of abortion in Sri Lanka as yet.

(3) **Abortion in Singapore:** In the Republic of Singapore the Termination of Pregnancy Act 1974\(^\text{18}\) consisting of 11 Sections,\(^\text{19}\) legalises termination of pregnancy and lays down the conditions under which it would not attract criminal sanction. Sub-section 1 to Section 3 of the Act which is the operative section states: Subject to the provisions of this Act, no person shall be guilty of an offence under the law relating to abortion by an authorised medical practitioner acting on the request of a pregnant woman and with her written consent.

The impugned section imposes only two conditions for medical termination of a pregnancy, viz:

(i) The termination must be performed by an authorised medical practitioner; and

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\(^{17}\) Penal Code of Ceylon, 1885 (is based on the Indian Penal Code 1860), section 303 provides punishment for causing miscarriage: section 304 for causing miscarriage without the consent of the woman: section 305 punishes when death is caused by an act done with intent to cause miscarriage; and section 307 deals with causing death of a quick unborn child by an act amounting to culpable homicide. Section 306 holds a person guilty for an act done with intent to prevent a child being born alive or to cause it to die after birth.


\(^{19}\) The Termination of Pregnancy Act, 1974, sec. 2. “Medical Practitioner” means any person authorised under the Medical Registration Act.
(ii) The termination must be done on the request of a pregnant woman and with her written consent.

Sub-section 2 to Section 3 of the Act of 1974 provides that except in cases provided under Section 10 of the Act\textsuperscript{20} where the treatment consists solely of the use of drugs prescribed by an authorised medical practitioner the treatment to termination of pregnancy must be carried out in a government hospital or in an approved clinic.

According to sub-section 3 of Section 3 of the Act of 1974 in order to avail the benefit of the treatment to termination of pregnancy the pregnant woman must be:

(a) A citizen of Singapore or the wife of a citizen of Singapore; or

(b) The holder of, or is the wife of a holder, of an employment pass or a work permit pass under the Immigration Act; or

(c) Has been resident in Singapore for a period of at least 4 months immediately preceding the date on which such termination is to be carried out.

However, the above conditions shall not apply in case of any treatment to termination of pregnancy which is immediately necessary to save the life of the pregnant woman.

One of the important features of the Act is that Section 4(1)(a) prohibits termination of pregnancy beyond 24 weeks unless the termination is immediately necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman. In case of contravention of the provisions of the Act, a person is liable on conviction to a fine up to $ 3,000 Singapore dollars or imprisonment for a term not exceeding three years or with both.\textsuperscript{21}

\textsuperscript{20} Id., sec. 10 confers relief from certain restrictions where termination of pregnancy consists solely of drugs.

\textsuperscript{21} The Termination of Pregnancy Act, 1974, sec. 3(4).
Conscientious objection to participation in treatment: Sub-section 1 to Section 6 of the Termination of Pregnancy Act of 1974 confers the right to freedom not to participate in the process of termination of pregnancy, if one has a conscientious objection. It grants immunity to the doctors who because of their faith and conscientious objection do not want to participate in the treatment of termination of pregnancy.

However, in case of treatment which is absolutely necessary to save the life or to prevent grave permanent injury to the physical or mental health of a pregnant woman, the doctor will be under a legal duty to participate in the treatment and will not be covered by sub-section (a) of section 6 of the Act. The burden of proof of conscientious objection in such a case will lie on the person claiming to rely on it.

The law of abortion in Singapore would reveal that it is one of the most progressive legislations on the subject in as much as it gives absolute immunity and freedom to a woman to decide about her life and to choose to bear a child or not. In other words the Act confers on a woman the right to privacy of her life.

(4) Abortion in Malaysia: The law of abortion in Malaysia, as stated earlier is contained in Sections 312 to 315 of the Malaysian Penal Code. Section 312 of the Code punishes causing miscarriage as in case of Section 312, I.P.C. In 1989 Section 312 was amended and an Exception Clause was added in order to permit termination of pregnancy in certain limited cases, such as when it

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22 Id., sec. 6(1), "...no person shall be under any duty whether by contract or by any statutory or legal requirement to participate in any treatment to terminate a pregnancy authorized by this Act to which he has a conscientious object".
23 Id., sec. 6(3).
24 Id., sec. 6(2).
25 Exception clause was added in sec. 312 of the Malaysian Penal Code vide Act A727/89 sec. 9(a) with effect from 5-5-1989.
involves risk to the life or physical or mental health of the pregnant woman. Section 312 of the Code reads:

_Causing miscarriage_ :- Whoever voluntarily causes a woman with child to miscarry shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both; and if the woman be quick with child, shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine.

*Exception* :- This Section 312 does not extend to a medical practitioner registered under the Medical Act, 1971 who terminates the pregnancy of a woman if such medical practitioner is of the opinion, formed in good faith, that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or injury to the mental or physical health of the pregnant woman, greater than if the pregnancy were terminated.

The Exception clause softens the strict provision of law of abortion. It allows termination of pregnancy by a registered medical practitioner if he is of the opinion formed in good faith that—

(i) The continuance of pregnancy would involve risk to the life of the pregnant woman; or

(ii) Injury to the mental or physical health of the pregnant woman.

The Exception clause does not mention anything about the time limit within which, termination of a pregnancy is allowed. It obviously means a pregnancy might be terminated at any time until the child is born.

*(5) Abortion in Indonesia:*- In Indonesia abortion is illegal and termination of a pregnancy is not permitted under any circumstances. Even to save the life of the mother is not an excuse for termination of a pregnancy. The Penal Code of
Indonesia of 1915 in Articles 346 to 349 provide for punishment for offences relating to induced abortion.

Article 346 of the Code makes a woman guilty of an offence if she with deliberate intent causes or lets another to cause the drifting off or the death of the fruit of her womb, and is liable on conviction to imprisonment which may extend to four years. Article 347 holds a person guilty of an offence, if he causes the drifting off or the death of the fruit of the woman without her consent and is liable on conviction to a maximum period of twelve years of imprisonment, and if it results in the death of the woman punishment may extend to imprisonment of fifteen years.

Article 348 provides for a lesser punishment in case of drifting off or the death of the fruit of womb takes place with the consent of the woman, which may extend to imprisonment of five years and six months, and if it results in the death of the woman punishment may extend to seven years of imprisonment.

Article 349 of the Code makes a physician, midwife or pharmacist guilty of an offence, if he or she is an accomplice to one of the crimes described in Articles 347 and 348 and liable to punishment which may be enhanced to one-third of the punishment prescribed for the offences under the respective articles and may also be deprived of the exercise of the profession in which he or she commits the offence.

(6) Abortion in Philippines:- The revised Penal Code of Philippines of 1932 in Articles 256 to 259 has made induced abortion punishable. Article 256

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26 Penal Code of Indonesia, Article 346.
27 Id., Article 347(1).
28 Id., Article 347(2).
29 Id., Article 348 (1).
30 Id., Article 348 (2).
31 Article 256 –Intentional abortion: Any person who shall intentionally cause an abortion shall suffer.
makes intentional abortion and Article 257\textsuperscript{32} unintentional abortion crime. Article 258\textsuperscript{33} provides punishment in case of abortion practiced by the woman herself or by her parents; and Article 259\textsuperscript{34} is attracted when abortion is practiced by a physician or midwife who, taking advantage of their scientific knowledge or skill, shall cause an abortion or assist in causing the same. In such a case the penalty would be the same as provided under Article 256 for intentional abortion.

Any pharmacist who, without the proper prescription from a physician, shall dispense any abortive shall be liable to punishment under Article 259 of the Code, for \textit{arresto mayor} and a fine upto 1,000 pesos (Philippines currency).

The Philippines Penal Code like the Penal Code of Indonesia does not permit termination of pregnancy even to save the life of the woman. It is perhaps because of strong influence of Catholic Church which is opposed to and does not allow abortion under any circumstances.

(7) Abortion in United Kingdom:- At common law procuring or attempting to procure termination of pregnancy before “quickening” was not an indictable (chargeable) offence.\textsuperscript{35} It was only after quickening that the abortion was punishable as an offence. By United Kingdom’s first criminal abortion statute, Lord Ellenborough’s Act, 1803,\textsuperscript{36} the crime of abortion was pushed back to commencement of the pregnancy and distinction between an abortion before and after quickening abolished. In 1861 the Offences Against the Person Act,

\textsuperscript{32} Article 257 – Unintentional abortion: The penalty of prison correctional in its minimum and medium periods shall be imposed upon any person who shall cause an abortion by violence, but unintentionally.

\textsuperscript{33} See, Article 258.

\textsuperscript{34} Article 259 provides punishment for abortion practiced by a physician or midwife and dispensing of abortive without proper prescription.

\textsuperscript{35} W. Blackstone, Commentaries, 129-130; E. Coke. Institutes III 50. The common law fixed the time of animation (vivacity) at the time of quickening when the foetus moved in the womb an event.

\textsuperscript{36} See, Glanville Williams, Textbook of Criminal Law, 250 (1970).
1861 in Sections 58 and 59 of the Offences Against the Person Act, 1861 was doing more harm than good. The attitude of medical profession was hostile and tragic cases continued to occur. Women who had been raped, deserted by their husbands, and over burdened mothers living in poverty with large families failed to get a medical abortion. Of course, the abortions could be bought but with a heavy price. As a result most of the women would go to 'back street abortionists' wielding a knitting needle, syringe, or stick leading to a great risk to their life. At times unwilling mothers used dangerous methods on themselves or committed suicide. It was also noticed that although illegal abortions were taking place in thousands, yet convictions were negligible. The police would not look upon abortion as a real crime for which they will initiate prosecution.

(i) Abortion Act, 1967:- As these evils were beginning to be realised, a strong opinion grew that a woman has a right to control her own fertility and that the abortion should be legalised. At the same time a powerful religious lobby basing itself upon their “sanctity of life” was opposed to any move for change in the law. As a compromise measure the Abortion Act, 1967 was passed

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37 See Offences Against the Person Act of 1861 section 58 (subject to Abortion Act, 1967 and Human Fertilization and Embrology Act, 1990 section 37) prohibits attempt to procure miscarriage from any time after the conception of the child until its birth. The section covers two situations, first, where a pregnant woman administers to herself any poison or noxious thing or uses any instruments or other means to procure her own miscarriage and second, where any one else unlawfully procures abortion whether the woman is or is not pregnant. Punishment under the section on conviction may extend upto imprisonment for life.

38 Id., Sec. 59 punishes supply or procuring of noxious drugs or instruments knowing it to be unlawfully used for causing abortion with imprisonment which may extend upto five years.

39 The Act (87 of 1967) is a small Act consisting of seven sections. The Act does not apply to Northern Ireland vide section 7(3) of the Act.
which substantially liberalised the law of abortion though it did not concede all
the demands of the pro-abortionists.

The Act of 1967 has legalised the termination of pregnancy by a
registered medical practitioner under Section 1 which states:
Medical Termination of Pregnancy :- (1) Subject to the provisions of this
section, a person shall not be guilty of an offence under the law relating to
abortion, when a pregnancy is terminated by a registered medical practitioner
if two registered medical practitioners are of the opinion, formed in good faith.

(a) That the continuance of the pregnancy would involve risk to the life of
the pregnant woman, or of injury to the physical or mental health of the
pregnant woman or any existing children of her family, greater than if
the pregnancy were terminated; or

(b) That there is substantial risk that if the child were born it would suffer
from such physical or mental abnormalities as to be seriously
handicapped.

Thus a pregnancy may lawfully be terminated on health and eugenic grounds.
Health ground includes the health of the woman and the children. According
to the World Health Organization health broadly, include, “the state of
complete mental, physical or social well being, and not merely absence of
disease or infirmity”.

(ii) Procedural safeguards:- To safeguard the interest of the pregnant woman
Section 1 of the Act has provided three procedural safeguards. Contravention
of the provisions would make termination of a pregnancy illegal and contrary
to law. These safeguards are:

(i) The pregnancy must be terminated by a registered medical
practitioner;

41 See Glanville Williams, Textbook on Criminal Law, 250 (1970).
42 Id., note 1, sec. 1(1).
(ii) Two registered medical practitioners must have formed opinion in good faith that the abortion is necessary, and

(iii) The treatment for the termination of pregnancy must be carried out in a National Health Service Hospital or in an approved nursing home, by the Secretary of the State.

(iii) Termination of pregnancy by medical practitioners vis-à-vis nurses:

Royal College of Nursing: In *Royal College of Nursing of the United Kingdom v. Department of Health and Social Security,* (1981) an important question as to legality of the role of nurses in termination of a pregnancy by medical induction was debated before the House of Lords. There are two stages in medical induction, viz.,

*first* being the insertion of catheter by means of a pump or drip apparatus; and *second,* the administration of fluid.

The *first* stage was carried out by doctors and the *second* by nurses under the doctor's instructions but in his absence, although he would be on call. The causative factor in inducing labour and thus in terminating the pregnancy was the administration of fluid which was done by the nurse and not the doctor.

The Department of Health and Social Security issued a circular to the nursing profession stating that no offence was committed within Section 1(1) of the abortion Act, 1967 by nurses who terminated the pregnancy by medical induction. If a doctor on the termination, initiated it and remained responsible throughout for its overall conduct and control. The Royal College of Nursing disputed the contention and brought a declaration against the Department of Health and Social Security in the court that the advice was wrong and that the

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43 Id., sec. 1(2).
44 Id., sec. 1(2).
45 (1981)1 All ER 545.
act carried out by the nurses in terminating a pregnancy by the induction method contravened the provisions of Section 1(1) of the abortion Act of 1967.

The lower court upheld the Department's contention. The College appealed to the Court of Appeal which reversed the decision of the lower court holding that the whole process of medical induction had to be carried out by a doctor and not merely under a doctor's instructions if it was to come under Section 1(1) of the Act of 1967. The department appealed to the House of Lords against the decision.

The House of Lords by a majority of three to two set aside the unanimous verdict of the Court of Appeal and restored the verdict of the lower court. The court held that if a doctor prescribed the treatment for the termination of a pregnancy, remained in charge and accepted responsibility throughout, and the treatment was carried out in accordance with his directions, the pregnancy was terminated by registered medical practitioner for the purposes of Section 1(1) of the act of 1967 and any person taking part in the termination was entitled to the protection afforded under the Act. But if the doctor were to direct the whole procedure by correspondence or over telephone, the operation would presumably be unlawful.

**Leading case** Child’s death as a consequence of injury to mother resulting in premature delivery – manslaughter – House of Lords (1997)

Attorney General's Reference (No 3 of 1994)46

**Pr Lord Mustill:** The defendant stabbed a young woman, who was to his knowledge pregnant with his child. A few weeks after the stabbing, the woman gave birth to a grossly premature child. The knife had penetrated the foetus. The child died 121 days later from a lung infection known as broncho-

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46 [1997]3 All ER 936 (HL). Judgement was delivered by Lord Goff of Chieveley, Lord Mustill, Lord Slynn of Hadely, Lord Hope of Craighead and Lord Clyde.
pulmonary dysplasia from the effects of premature birth but unconnected with the knife wound and the defendant was thereafter charged with her murder.

The trial, judge ordered acquittal or the ground that no conviction for either murder or manslaughter was possible in law.

The Attorney General subsequently referred to the Court of Appeal the following two questions for its decision, viz;

(i) Whether subject to proof of the requisite inert, the crimes of murder and manslaughter could be committed where unlawful injury was deliberately inflicted to a mother carrying a child in utero where the child was subsequently born alive, existed independently of the mother and then died, the injuries while in utero either having caused or made a substantial contribution to the death; and

(ii) Whether the fact that the child's death resulted from injury to the mother rather than as a consequence of direct injury to the foetus could remove any liability for murder or manslaughter in those circumstances.

The Court of Appeal answered the first question in the affirmative, on the ground that the foetus was to be treated as part of the mother until it had a separate existence of its own, but answered the second question in the negative.

On the defendant's application the Court of Appeal referred the points to the House of Lords, which held that:

Manslaughter could be committed since the requisite mens rea to be proved in a case of manslaughter was an intention to do an act which was unlawful and which all sober and reasonable people would recognize as dangerous, i.e. likely to harm another person.

Since, in the instance case, the defendant intended to stab the child's mother and that was an unlawful and dangerous act, it followed that the requisite mens
rea was established and although the child was a foetus at that time, on public policy grounds she was to be regarded as coming within that mens rea when she became a living person. Accordingly, the fact that the child’s death was caused solely as a consequence of injury to the mother, rather than injury to the foetus, did not negative any liability for manslaughter.

Appeal allowed case sent for retrial.

(8) Abortion in United States of America

Leading case: - The criminal statute of Texas prohibiting legal abortion without regard to the stage of the pregnancy is violative of the ‘due process clause’ and is void—US Supreme Court (1973) Roe v. Wade.47

Jane Roe brought a class action challenging the constitutionality of the Texas criminal abortion laws, restricting, procuring or attempting to procure abortion on medical advice for the purpose of saving the mother’s life.48

The petitioner pleaded that the criminal abortion laws of the State of Texas were unconstitutionally vague and that they abridged her right of personal privacy, which inter alia include right to abortion protected by the first, fourth, fifth, ninth and fourteenth amendments to the US Constitution.

The State of Texas on the other hand, argued that the state’s determination to recognise and protect parental life from and after conception constitutes ‘a compelling state interest’ and that the foetus is a ‘person’ with in the languages and meaning of the ‘due process clause’ of the fourteenth amendment to the US Constitution.

The Supreme Court of the United States refrained from resolving the difficult question of when life begins and said that when those trained in the

48 Roe alleged that she was unmarried and pregnant and she wished to terminate her pregnancy by an abortion performed by a competent licensed physician, under safe clinical conditions; that she was unable to get a legal abortion in Texas because her life did not appear to be threatened by the constitution of her pregnancy, which is the condition for permitting abortion in law.
respectively disciplines of medicines, philosophy and theology are unable to arrive at any consensus the judiciary is not in a position to speculate as to the answer. As regards the state’s important and legitimate interest in the health of the mother, the court said:

In the light of present medical knowledge ‘the compelling point’, is at approximately the end of the first trimester year, that until the end of the first trimester morality in abortion may be less than morality in abortion in normal child birth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible state regulation in this are requirements as to the qualifications of the person who is to perform the abortion, as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic.\(^49\)

Measured against these standards, the court held that the Texas criminal-abortion statute restricting legal abortion without regard to stage of pregnancy and without regard to other interest involves, is violative of the ‘due process clause’\(^50\) of the fourteenth amendment to the US Constitution, which protects against the state’s action, the right to privacy, including a woman’s qualified right to terminate her pregnancy. Thus, the court permitted abortions in three situations:

(i) within three months of pregnancy, woman is entitled to go for abortion and she is entirely free to decide;

(ii) in case of pregnancy during the next six months, the state law may regulate abortion procedure taking into consideration the mother’s health;


\(^50\) The ‘due process’ clause of the US Constitution states: ‘nor shall any state deprive any person of life, liberty or property, without due process of law’.
(9) Abortion in Ireland

Abortion is illegal in Ireland. The unlawful killing of an unborn child is a criminal offence under the provisions of Sections 58 and 59 of the Offences Against the Person Act, 1861 carrying a maximum punishment of penal servitude for life. However, as stated earlier, the Supreme Court of Ireland has permitted abortion in case of real and substantial danger or risk to the life of the mother.51

Leading case :- Right to life of the mother is superior to right to life of the unborn – House of Lords (1992), **Attorney General of Ireland v. X**.52

In this case, a vexed question of law and fact as regards the right to life of the unborn and right to the life of the mother was involved.

A 14 year old school girl who discovered in January 1992 that she was pregnant as the result of an alleged rape by the father of her friend in the month of December 1991 was not permitted under the Irish law to get her pregnancy terminated. The girl and her parents accordingly decided to obtain an abortion in England. In the meantime, the Attorney General obtained an interim injunction in the high court restraining the girl and her parents from interfering with the right to life of the unborn, from leaving the jurisdiction for nine months, and restraining them from procuring or arranging an abortion within or outside the country.

Rejecting the defence plea, that psychological damage to the girl of carrying a child would be considerable and that the damage to her mental health would be devastating if the termination of pregnancy is not allowed, the high court granted permanent injunction. A reference was made to sub-section (3) to Section 3 of the Article 40 of the Irish Constitution to vindicate the right to life of the unborn.

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52 (1992)1 IR 1.
The said sub-section says:
The State acknowledges the right to life of the unborn with regard to the equal right to life of the mother/guaranteed in its laws to respect, and as far as practicable by its laws to defend and vindicate that right.

While referring to the above constitutional provisions, the court observed that the right to life of the unborn is guaranteed under the Constitution and that it was the duty of the various organs of the government including the judiciary to defend and vindicate that right.

Judging and comparing the magnitude of the danger to the life of the child and the danger that exists to the life of the mother, the court said:

The risk that defendant may take her own life if an order is made prohibiting termination of pregnancy is much less and is of a different order of magnitude than the certainty that the life of the unborn will be terminated if the order is not made. The young girl has the benefit of the love and care and support of devoted parents who will help her through the difficult months ahead. Having had the regard to the rights of the mother in this case, the court’s duty to protect the life of the unborn requires it to take the order sought.\(^5\)

However, the Supreme Court of Ireland by a majority of four to one allowed the appeal against the order of the high court and discharged the injunction issued against the defendants. The court observed that the Constitution requires that its provisions be interpreted harmoniously and that the rights thereby given to the unborn and to the mother be interpreted in concert. Since there was a real and substantial risk to the life of the mother by self-destruction as depicted by her suicidal tendency, which can only be avoided by

termination of her pregnancy, the court observed that the defendant is permitted to obtain abortion in Ireland.

Appeal was allowed.

(10) Abortion in France

**Leading case**: Foetus not a human being protected by the French Penal Code: European Commission of Human Rights declined to acknowledge that unborn child is 'A Person' within Article 2 of ECHR (2004), \( V_0 \) v. France.\(^{54}\)

In \( V_0 \) v. France\(^{55}\) a doctor negligently caused fatal injury to a viable foetus after mistaking the mother's identity for that of another patient. The French criminal court acquitted him on the basis that the foetus was not a human being for the purpose of the offence.

On application to the European Commission of Human Rights, the court declined to decide directly whether the foetus is protected by the right to life in art 2 of European Convention of Human Rights (ECHR). The court ruled that the issue of life's commencement and its protection by criminal law was within the margin of appreciation extended to the member states. The court acknowledged that in the circumstances examined to date by the convention institutions—that is, in the various laws on abortion—the unborn child is not regarded as a 'person' directly protected by Article 2 of the European Convention of Human Rights\(^{56}\) and that if the unborn does have a 'right to life', it is implicitly limited by the mother's rights and interests.

\(^{54}\) [2004]2 FCR 577.

\(^{55}\) Ibid.

\(^{56}\) European Commission of Human Rights, art 2 says:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
   (a) in defence of any person from unlawful violence;
   (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
   (c) in action lawfully taken for the purpose of quelling a not or insurrection.
(II) Miscarriage (Abortion) in India

Following sections viz. 312-316 of IPC deal with miscarriage which are discussed below.

Section 312. Causing miscarriage: Whoever voluntarily causes a woman with child to miscarry shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Explanation: A woman, who causes herself to miscarry, is within the meaning of this section.

Analogous law: As to this group of sections the authors of the code wrote: "With respect to the law on the subject of abortion, we think it necessary to say only that we entertain strong apprehensions that this or any other law on that subject may, in this country, be abused to the vilest purpose. The charge of abortion is one which, even where it is not substantiated, often leaves a stain on the honour of families. The power of bringing a false accusation of this description is, therefore, a formidable engine in the hands of unprincipled men. This part of the law will, unless great care be taken, produce few convictions, but much misery and terror to respectable families, and a large harvest of profit to the vilest pests of society. We trust that it may be in our power in the Code of Criminal Procedure to lay down rules which may prevent such an abuse. Should be not be able to be so, we are inclined to think that it would be our duty to advise his Lordship in Council rather to suffer abortion, when a mother is a party to the offence to remain wholly unpunished, than to repress it
by provisions which would occasion more suffering to the innocent than to the guilty.”

These views of the authors have been given effect to by the Criminal Procedure Code, which takes the offence out of the cognizance of the police. For the offence, as here constituted, the mother, as well as her accomplice are punishable. But only the accomplice, and not the mother, was at one time punishable under English law, but the law, as since enacted, makes them both equally liable.

**Principle**: The offence of foeticide may be committed with or without the consent of the woman. This section relates to the causing of miscarriage with her consent, while the next section deals with the same operation performed without her consent. The saving grace of the offence, in each case, is good faith and life-saving necessity.

**Meaning of words**: “A woman with child” simply means pregnant, as opposed to being “quick with child” which refers to that advanced stage of pregnancy when the “quickening” takes place. “Quickening” is the perception by the mother of the movements of the foetus, when the embryo assumes a foetal form. It is derived from Lat., *vius* = Skr, *jiv* = to live, and “quick” thus means “living.” The old notion was that the foetus became first endowed with life when that sensation was felt.

**What is causing miscarriage?**: The term “causing miscarriage” has not been defined, and requires a word of explanation. It would include anything done or given to the woman to procure abortion and which has that result. A mere verbal advice as to the potency of certain drugs to procure abortion is not sufficient. Such a person may be guilty of abetment but he cannot be convicted.

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57 Note M. Reprint, p. 151.
58 43 Geo. III, 58:9 Geo. IV, c. 31: 7 Will. IV and I Vict... c. 85.
59 24 & 25 Vict... c. 100. Sec. 58.
60 Ademma v. Emperor, I.L.R. 9 Mad. 369 at p. 370.
of an attempt to commit this offence, or of its commission under this section. But in England, where the offence consists of "administering or causing it to be taken" it has been held that a mere delivery of the poison or other noxious thing to the woman is not sufficient unless she swallows a part of it, in which case the administering is complete. But this section does not follow the verbiage of the English statute. And it is apprehended that a person who supplies to a woman an abortive drug which she takes, would be as much guilty as if he had himself put it down her throat, provided, of course, that the other elements of the crime are present and proved. Indeed, this was the view taken on a case reserved, where the prisoner having been asked by one Emma Cheney to give her something to cause her miscarriage delivered her some preparation of mercury which she took in his absence. It was held that the prisoner was properly convicted of "causing to be taken" within the statute.

Miscarriage after being "quick with child" :- A woman who miscarries only when she is "with child" is not liable to the same degree of punishment as one who causes miscarriage after she is "quick with child." The term "quickening" implies perception by the mother of the movements of the foetus after the embryo has assumed a foetal form. Which ordinarily takes place between the fourth and the fifth months of conception.

Leading case :- Foetus too a consumer (like other human beings) - entitled to insurance claim: The Maharashtra State Consumer Commission (2007), Kanta Mohanlal Motecha v. Branch Manager, United India Insurance Co. Ltd. The Maharashtra State Consumer Commission, in a landmark judgment Kanta Mohanlal Motecha v. Branch Manager, United India Insurance Co. Ltd. on 6

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63 Ademma v. Emperor, 1.L.R. 9 Mad. 369.
64 2 Taylor on Evidence, 186.
65 Times of India, 6 March 2007, p. 1 and p. 8.
March 2007 held that an unborn child killed in a car crash is entitled to insurance claim. The court referring American law under the Unborn Victims of Violence Act 2004, that recognises human foetus personhood said an unborn child is a consumer and hence entitled to insurance coverage like other human beings. The court made it clear that since law recognises a pregnant woman as a consumer, the foetus in her womb be also considered a separate entity in respect of insurance claims. Mohanlal Motecha had taken a comprehensive insurance policy for his Maruti car and it included coverage of Rs. 1 Lakh each to three unnamed passengers and Rs. 2 Lakh for the owner-driver.

On the fateful night Mohanlal Atul (who was driving) and Atul’s wife Switi (who was seven-month pregnant) were traveling in the car when it crashed on the Yavatmal-Nagpur road. All of them died on the spot. Kanta Kotecha (widow of Mohanlal, mother of Atul and mother-in-law of Switi) succeeded in getting claims in respect of ‘deaths of Mohanlal, Switi and Atul, from insurance company, but the claim in respect of the foetus was rejected by the District Forum on the ground that an unborn child cannot be treated as a passenger. Hence, she went in appeal before the Maharashtra State Commission.

Allowing the appeal, the Maharashtra State Consumer Commission observed that law is not static but in instrument of socio-economic change. The court held according to science, during the second trimester of pregnancy from the thirteen to the twenty-seventh week, the embryo turns into a foetus and attains a recognisable human form. It may be noted that Hindu law also recognises the unborn child as a living human being and is entitled to inherit the property of his parents like other family members.
In 1971, to give legal direction to the abortion for justified reasons an Act was passed which is discussed here (Relevant portion) The Medical Termination of Pregnancy Act 1971. In 1971, the Parliament passed an Act, called "The Medical Termination of Pregnancy Act (Act No. 34 of 1971) to provide for the termination of certain pregnancies by registered medical practitioners and matters connected therewith or incidental thereto. The Act is reproduced here for ready reference.

1. Short title, extent and commencement. —(1) This Act may be called the Medical Termination of Pregnancy Act, 1971.66

2. It extends to the whole of India except the State of Jammu and Kashmir.

3. It shall come into force on such date as the Central Government may by notification in the Official gazette appoint.

2. Definitions In this Act, unless the context otherwise requires —

(a) "guardian" means a person having the care of the person of a minor or a lunatic;

(b) "lunatic" has the meaning assigned to it in Section 3 of the Indian Lunacy Act, 1912;

(c) "minor" means a person who under the provisions of the Indian Majority Act, 1875 (9 of 1875), is to be deemed not to have attained his majority:

(d) "registered medical practitioner" means a medical practitioner who possesses any recognized medical qualification as defined in Clause (h) of Sec. 2 of the Indian Medical Council Act, 1956 (102 of 1956), whose name has been entered in a State Medical Register and who has

66 For Statement of Objects and Reasons, see Gazette of India. Extraordinary, Pt. II. Sec. 2. dated 17-11-1969 at p. 889.
such experience or training in gynecology and obstetrics as may be prescribed by rules made under this Act.

3. When pregnancies may be terminated by registered medical practitioners.

(1) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with provisions of this Act.

(2) Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner,—

(a) where the length of the pregnancy does not exceed twelve weeks, if such medical practitioner is, or

(b) where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioners are of opinion, formed in good faith, that—

(i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or

(ii) there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities to be seriously handicapped.

Explanation I— Where pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute grave injury to the mental health of the pregnant woman.

Explanation II— Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted
pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

(3) In determining whether the continuance of pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken of the pregnant woman's actual or reasonably foreseeable environment.

Protection of action taken in good faith: No suit or other legal proceeding shall lie against any registered medical practitioner for any damage caused or likely to be caused by anything which is in good faith done or intended to be done under this Act.

As per development of time, new necessities were realised due to use and misuse of the Act of 1971 above mentioned, a new Act known as Pre-Natal Diagnostic techniques (Regulation of Misuse) Act 1994 was passed which proved to be a very good law. Here we will discuss the relevant portion only.

Pre-Natal Diagnostic Techniques (Regulation of Misuse) Act 1994

It is found that even in many educated and highly well placed families the birth of a female child is not welcomed with open arms. This has resulted in the growth of Pre-Natal Diagnostic Centers in cities which help in determining sex of foetus that ultimately lead to female foeticide.

Female foeticide is a blatant violation of human rights and an insult to the dignity and status of women. Taking note of the gravity of the problem, the Parliament passed the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act 1994 to ban pre-natal diagnostic techniques for

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67 The Pre-Natal Diagnostic techniques (Regulation and Prevention of Misuse) Act 57 of 1994. It is a small Act consisting of 34 sections divided into eight chapters. Besides providing for regulations of genetic counselling, ch II and Pre-Natal Diagnostic Techniques in ch III (ss 4-6), chs IV, V and VI deal with the constitution of Central Advisory Board, Advisory Committee and provisions of registration of genetic counselling laboratories and clinics etc. Ch 7, provides for prosecution and imposition of penalty including imprisonment and fine.
determination of sex of the foetus, leading to female foeticide. The PNDT Act 1994 envisages to provide for the regulations of the use of pre-natal diagnostic techniques for detecting genetic or metabolic disorders or chromosomal abnormalities or certain congenital abnormalities or sex linked disorders and for the prevention of misuse of such techniques for the purpose of prenatal sex determination leading to female foeticide, etc.

Section 6(a) of the PNDT Act 1994 prohibits genetic counselling centers, genetic laboratories or clinics to conduct or cause to be conducted any pre-natal diagnostic technique including ultrasonography of determine the sex of a foetus; and sub-section (b) to Section 6 prohibits individuals from associating themselves in any such act of pre-natal exercise of determining the sex of the foetus of the child in the mother’s womb. In case of contraventions of such provisions, persons responsible and the proprietors of such clinics, health centres etc, are liable to be prosecuted and punished with imprisonment, which may extend up to three years and fine.68

No doubt, the PNDT Act 1994 has provided stringent penalties against those indulging in nefarious trade of pre-natal diagnostic techniques of determining sex of the child for the purpose of encouraging foeticide, but still the practice is rampant. This is evident from the fact that as many as 260 half-burnt foetuses dumped in a septic tank on the premise of an unauthorized nursing home of a quack, Dr. A.K. Singh in Pataudi, Gurgaon, Haryana was discovered in June 2007. The accused had charged as much Rs 20,000 for pre-natal sex determination followed by selective abortions.69

Perhaps it needs education, social awareness and the elimination of the feeling of insecurity and bias towards female child, and stringent enforcement of law along with harsh punishment with exorbitant fine.

68 Pre-Natal Diagnostic Techniques (Regulation of Misuse) Act 1994, s. 23(1).
Section 313. Causing miscarriage without woman's consent: Whoever commits the offence defined in the last preceding section without the consent of the woman, whether the woman is quick with child or not, shall be punished with [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Without Consent. The last section applies equally both to the woman miscarrying and to the abortionist who causes her miscarriage. The offence is committed by the latter with the consent of the former. They are therefore, both particeps criminis. This section with the same case presented under different circumstances. It relates to the commission of the same offence when the woman, who is primarily interested in the result, is not a consenting party to the act. This naturally aggravates the crime, and justifies the heavier sentence here provided. It is, indeed, lighter than under English law, where the offence in a similar case would be murder.


Facts: The case of the prosecution, in brief, is that the appellant Hasi Mohan Barman was having love affair with the first informant PW-1 Haleswari Barman, which subsequently developed into physical relationship and as a result thereof PW-1 became pregnant. The villagers put pressure upon Hasi Mohan Barman to marry PW-1 which he declined. He asked PW-1 to abort the child which she refused to do. Thereafter, in the night of the incident Hasi Mohan Barman took PW-1 Haleswari Barman to the pharmacy of co-accused Abinash Biswas, who administered certain injection whereupon PW-1 became unconscious and the child was aborted. She was administered saline and the appellant Hasi Mohan Barman kept her at 'Pampghat' for about nine days.

70 AIR 2008 SC 388.
wherefrom she was taken to her parents house. After few days PW-1 lodged an FIR against both the appellants. The police, after investigation, submitted charge-sheet only against Hasi Mohan Barman but subsequently co-accused Abinash Biswas was also summoned under Section 319 Cr.P.C. to face the trial.

**Held** :- Section 320 of Code of Criminal Procedure says that the offences punishable under the sections of the Indian Penal Code (45 of 1860) specified in the first two columns of the table next following may be compounded by the persons mentioned in the third column of that table. A perusal of Section 320 will show that the offence under Section 313 IPC is not compoundable. Therefore, the consent given by the wife PW-1 or the affidavit filed by her cannot be utilized for the purpose of recording a finding of acquittal in favour of the accused appellants.

Following the view taken in the above noted cases we are of the opinion that the complainant and the principal accused having already married it will be in the interest of justice if the sentence is reduced to the period already undergone. The appeal is accordingly partly allowed. The conviction of the appellants under Section 313 IPC is maintained but the sentence is reduced to the period already undergone which appears to be about ten months. The fine imposed upon the appellants is also set aside. The appellants are on bail.

**Section 314. Death caused by act done with intent to cause miscarriage :-** Whoever, with intent to cause the miscarriage of a woman with child, does any act which causes the death of such woman, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine;
if act done without woman's consent: and if the act is done without the consent of the woman, shall be punished either with imprisonment for life], or with the punishment above mentioned.

Explanation: - It is not essential to this offence that the offender should know that the act is likely to cause death.

Consent mitigates the offence: - The only mitigating circumstance recognised in the section is the consent of the woman: such consent may be expressed or implied. It is not necessary that it should be worded with the accuracy of a plea. If an abortive is given to her, and she knowingly takes it, she consents to its taking and thereby consents to its being given to her.71 Indeed in the vast majority of cases, the only evidence available on this point would be the statement of the accused, which may be more or less corroborated by circumstances. Direct evidence on such a point is not to be expected, and if it is forthcoming it should be received with caution.

The consent of the woman freely and intelligently given is allowed to mitigate the offence. If A kill Z by administering abortives to her with the knowledge that those abortives are likely to cause her death, he is guilty of culpable homicide, which will be culpable homicide, by consent, if Z agrees to run the risk, and murder, if Z does not so agree.

Section 315. Act done with intent to prevent child being born alive or cause it to die after birth: - Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth, and does by such act prevent that child from being born alive or causes it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother, be

71 Kalachand Gope, 10 WR (Cri) 59.
punished with imprisonments of either description for a term which may extend to ten years, or with fine, or with both.

**Principle**: This offence is separated by a narrow margin from infanticide, which would in the same circumstances be murder, pure and simple. The only difference between such foeticide and infanticide which is murder is that the former offence is committed before its delivery, while the latter can only be committed after its delivery.

The section is aimed at foeticide while in the womb, after the foetus develops sufficiently to assume the human form, which it does in normal cases in the sixth month. When it attains that degree of development the act which, would if done earlier, by abortion, ceases to be so, as the delivery of an undeveloped child would be premature labour, for which the accused is held more responsible owing to the more advanced stage of foetal life.

**English Law**: If a person intending to procure abortion does an act which causes a child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world, the person who by his misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder; and the mere existence of a possibility that something might have been done to prevent the death will not render it any the less a murder.\textsuperscript{72}

The prosecution did not allege that the child was prevented to be born alive or was caused to die after its birth. Neither the child had any mark of injury nor had its mother. It had been born alive and died on account of natural debility. The only allegation against one of the appellants was that she was found with the dead body of the child at a bus stand. If she had to conceal the

\textsuperscript{72} R. v. West 2 C & K 784.
birth of the child and had secretly to dispose of the body, it was not expected of her to go in a busy locality like the bus stand and attract attention. Where there was no proof that the abortion was not natural, the accused under this section was entitled to acquittal.

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