

# Conceptual Understanding of 'Conduct' in Indian Evidence Act, 1872

Mr. Siddharth Shekar Dash<sup>1</sup>

Ms. Andrea Holikova<sup>2</sup>

## Introduction

Crime consists of *actus reus* and *mens rea*. *Mens rea* is nomenon where as *actus reus* is the phenomenon and manifestation of the former. This phenomenon is event and circumstance. *Actus reus* is the physical manifestation of the psychological happenings of the mind of the actor. In Indian Penal Code, an attempt is made to understand the phenomena by incorporation of word "act" under section 32<sup>3</sup>. Though it has not defined this word, a broader canvas is set by incorporation of "omission" as commission or *act*. Emphasising to understand the motion of events and its inherent traits the very next section mentions *act* means *acts*<sup>4</sup>. So an act is physical manifestations of events and phenomena. And to understand an "act", the *conduct* of an accused person is important. And to better understand the offence the conduct of the victim as well as the witnesses and other associated parties are also important. It is with such broad gamut the conduct is understood in law of evidence.

**Meaning of Conduct:** The conduct is the expression in outward behaviour of the quality or condition operating to produce those effects. The results are the traces by which we may infer the moving cause. It is "personal behaviour, whether by action or inaction; It is the "manner in which the person behaves"<sup>5</sup>. Conduct may, in certain circumstances, include statements.

## Relevancy of Conduct in Indian Law

To analyze the law on conduct it is pertinent to look Section 8 of the EA,

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<sup>1</sup>Assistant Professor, KIIT School of Law, KIIT University, Bhubaneswar

<sup>2</sup>Director, Department of Specific Legal Relations, National Reporting Section, Ministry of Finance, Slovak Republic.

<sup>3</sup>Indian Penal Code, 1861, Section 32 Words referring to acts include illegal omissions.—In every part of this Code, except where a contrary intention appears from the context, words which refer to acts done extend also to ille-gal omissions.

<sup>4</sup>Indian Penal Code, 1861, Section 32, "Act", "Omission".—The word "act" denotes as well a series of acts as a single act: the word "omission" denotes as well a series of omissions as a single omission.

<sup>5</sup>Aiyar, P. Ramanatha, Concise Law Dictionary, 3 Edition, Reprint, 2009, P.232



1872<sup>6</sup>. It makes motive, preparation, previous and subsequent conduct as relevant. Here it is to note that, while the motive and preparation of an accused of the crime are relevant; understandable and self-explanatory; the conduct is made relevant in an inclusive way. This means conducts not only of the accused but also the victims of the offence as well as the persons who are witnessing the offence are also relevant. If the event is so enthused that, it is reflected through body and mind of the persons witnessing, then such shall be relevant. The relevancy of such events is taken care of by section 6<sup>7</sup> of the Act, if the happening is *shortly before or after* the event. These are some essentially the principles of *res gestae* incorporated in the law of evidence in India under various sections.

The section does not rest there as to the inclusive incorporations of facets of conduct. It also states that conducts *before and after* the fact in issue are relevant. One of the obvious examples of it, when under section 84<sup>8</sup> of IPC the plea as to unsoundness of mind is taken and as per the section, the unsoundness at the *very* time of the offence committed becomes fact in issue, the prior or subsequent conducts reflecting the unsoundness of the accused become relevant u/s 8 of the Act to reach the unsoundness of mind at the very time of the offence committed.

Let us take a hypothetical case to understand the meaning and gamut of conduct. Suppose, A wants to kill B. The facts are:

He conceived a plot to kill B. He arranged a pistol. On a certain day he left for B with a pistol on his hand. He went towards the market where B happened to

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<sup>6</sup> Indian Evidence Act, 1872 Sec 8, Motive, preparation and previous or subsequent conduct is relevant, as 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.

<sup>7</sup> Indian Evidence Act, 1872 Section 6. Relevancy of facts forming part of same transaction.—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.

<sup>8</sup> The Indian Penal Code, 1861, Section 84. Act of a person of unsound mind.—Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.



purchase his daily needs. He searched him at the market and went one shop after another. Near a Grocers shop he saw him. He drew his pistol. B get petrified, seeing the A drawing his pistol. He is stricken with fear. The vendor too get petrified and scrambled for safe place. The customers witnessing the events also ran hunter and banter. B cried for help. Then, A pulled the trigger. The crowd and the vendor raised hullabaloo. And the bullet lunched into the chest of B. B fell down instantaneously. B writhed in pain. After that A ran away from the scene of the offence. B is shifted to hospital in the agony of pain by some persons who were part of the crowd that gathered due to the incident. B wreathed in pain. His body is blood soaked. He tried to utter the name of assistant, A. While wreathing in pain he uttered the facts of the event happened on him.

To break the facts for the convenience of understanding,

1. A conceived plot to kill B.
2. A arranged a pistol.
3. On a certain day A left for B with a pistol on his hand. He went towards the market where B happened to purchase his daily needs. He searched him at the market and went one shop after another. Near a Grocers shop he saw him.
4. He drew his pistol.
5. B get petrified, seeing the A drawing his pistol. He is stricken with fear.
6. The vendor too got petrified and scrambled for the safe place.
7. The customers witnessing the events also ran hunter and banter.
8. B cried for help.
9. Then, A pulled the trigger. The crowd and the vendor raised hullabaloo. And the bullet lunched into the chest of B.
10. B fell down instantaneously. B writhed in pain.
11. After that A ran away from the scene of the offence.
12. B is shifted to hospital in the agony of pain by some persons who were part of the crowd that gathered due to the incident. B wreathed in pain. His body is blood soaked. He tried to utter the name of assistant, A. While wreathing in pain he uttered the facts of the event happened on him.

Here, the motive and preparation of the accused shall be relevantly as neither the victim nor the witness can entertain or demonstrate it, understandably. Para.1 and 2, reflect it. The offence part of the facts which are in issue are in Para.4, 9

and 10. Those acts cumulatively show the *act* of the accused from the muscular contraction to its relative logical end, *effect*. So the *act* and its *effect* are compendium of facts constitute one normative event, *act*.

Just prior to the facts in issue, there are certain facts of conduct; Para.3 can be considered as conduct of the accused. It is previous conduct of the accused. Then, Para.11 reflects another conduct of the accused which is demonstrated after the offence. It is the subsequent conduct of the accused. Conduct u/s 8 is inclusive of conduct of the accused, victim and witnesses. So Para.5, 6 and 8 are also relevant u/s8.

There is a major difference between section 8 where the *conduct*, even if it is a *statement*, which is integral part of the former, is relevant and sec 6 where *statement* when it is integral part of the physical event and, in short, is considered in normative jargon *transaction*. At times these become so overlapping that these are difficult to differentiate from one another. The difference between statement u/s 8 and statement u/s 6 is that, the statement u/s 8 needs a canvas of *conduct* to understand it and becomes un-meaningful without such context of conduct. Whereas statement u/s 6 is independent meaningful statement and, it spontaneously oozes out of the psychological plain of the person due to the pulls and pressure of unfolding of the events. It is in essence the event speaking through the media of person undergoing it. Para.8 can be such statement. Also statements, in Para.9 raising of hullabalos, if independently meaningful, and in Para.12 when the victim tries to utter the name of the assailant and facts of the case come u/s 6. If any such meaningful statement would have been uttered in Para.5, 6 and 7, then such would also have been relevant u/s 6 as the *act* for the *act of transaction* already has begun after Para.4 drawing of the pistol. And if the victim happens to die, those *statements* of transaction if shows the cause of death will be relevant as Dying Declaration and would be relevant u/s 32<sup>9</sup> of the Act.

If the motion of events stretched more farther than the scene of the offence, certain other actions of the accused till the beginning of the *trial* of the case, and sometimes before the *judgment* of the case, becomes the relevant conduct. To quote an illustrations<sup>10</sup>, A is accused of a crime, the facts that..... at the time of,

<sup>9</sup>*Id.*, Section 32, IPC

<sup>10</sup>Section 8, Illustrations, A is accused of a crime, the facts that, .. ..... 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.



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.

Also, not only the conduct but those words and statements, oral or written are relevant if those *influence or influenced* by the conduct. This last parameter makes the relevancy of the facts as to the conduct most inclusive and broad. The Explanation 2 of the section 8<sup>11</sup> states it. The illustrations appended states, 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.

### **Conduct and the Dying Declaration**

The relevancy of the conduct of the complainant, *res gestae* u/s 6 of the Act and Dying Declaration statement become intertwined in the complex sets of fact. It becomes difficult at times to segregate those facts one from one another.

To reiterate, if the complainant or the victim dies, then the facts as to the statements become relevant u/s 32 of the Act than sec 6 of the Act. However the facts of conduct are relevant u/s 8 of the Act. If the complainant or the victim is alive then the facts of statements are relevant u/s 6 where as the facts conducts are relevant u/s 8 of the Act. In both these, it is important to differentiate the facts of statements, facts of conduct and those statements which apparently are words spoken but essentially a dimension of the conduct. These are, in short known as statement of "complaint", means the conducts are as if those are seeking for attention, asking for the redressal of the happening or complaining of the event of happening on the body and mind of the accused. The Explanation 1. of the Section states, "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".

The effect of the evidence is different in large scope of its relevancy under those sections. While a fact which is relevant u/s 32 as dying declaration is substantive in nature, means does not need to stand the test of corroboration and

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<sup>11</sup> *Id.*, Explanation 2 of Section 8 EA, 1872



contradiction u/s 145 and 157<sup>12</sup> of the Act others are relevant within the preview of corroboration and contradiction, or simply relevant for the contradiction depending upon the nature where the facts are reflected, to be evidence within the meaning of section 3<sup>13</sup> of the EA. If the facts are reflected on the FIR u/s 154<sup>14</sup> of Cr. P. C., those relevant facts can be used both for the corroboration and contradiction. However, if is reflected in the 161<sup>15</sup> Crpc statements, the relevant fact can only be used in order to contradict the statement of the maker making on the dock before the Court on oath.

A Leading Case on the point is relevancy u/s 8 and 32 is *Queen v. Abdullah*<sup>16</sup>.

<sup>12</sup> Indian Evidence Act, 1872, Section 145 Cross-examination as to previous statements in writing.—A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.”

Indian Evidence Act, 1872, Section 157. Former statements of witness may be proved to corroborate later testimony as to same fact.—In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

<sup>13</sup> Section 3, Indian Evidence Act, 1872, defines evidence which impliedly mean a fact which is deposed on oath and subject to cross-examination. Hence to qualify a fact to be an evidence strictly, requirement of the section is necessary. However the section 4 for the proof of a fact uses the word “after considering the *matter* before it” the court comes to a conclusion if a fact is proved or disproved. It does not use the word evidence. So apart from evidence other thing which are before the court is, the court considers it for the proof of the matter.

<sup>14</sup> The Code Of Criminal Procedure, 1973, Section 154. Information in cognizable cases: (1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read Over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

<sup>15</sup> The Code Of Criminal Procedure, 1973, Section 161. Examination of witnesses by police: (1) Any police officer making an investigation under this Chapter, or any police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case... (3) The police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records.

<sup>16</sup> <https://indiankanoon.org/doc/401427/>; (1885) ILR 7 All 385 (last visited on Mar. 21. 2017 at 13:21 hrs.)



### **Queen V. Abdullah**

#### **Fact of the Case, in short:**

Abdullah was prosecuted for the murder of a young girl, Dulari, aged about 15 to 20 years, allegedly a prostitute while she was asleep in her home. It was already morning and there was sufficient light to enable her to identify the assailant, who cut her throat with a razor. She was taken to a police-station and thence to the hospital where her mother, the Kotwal, a Deputy Magistrate and the Assistant Surgeon repeatedly attempted to know from her the name of the person who had injured her. But she was unable to speak, her throat being cut. She was, however, fully conscious and lifted her eyes to look upon every man who wanted to talk to her. She endeavoured to answer the question by nodding her head, but surgeon forbade her from doing so, as it was prejudicial to her health. Her mother assisted her elbow and enabled her to answer by affirmative and negative sign of her hand. Magistrate uttered some name like, Ismail, Akbar Khan, Khuda Baskh, Hussain and the like and asked regarding them one by one if they had wounded her. Every time she nodded negative sign except on the name of Abdullah. And then with subsequent various questions she revealed various particulars of Abdullah and other details of the crime.

#### **Issues before the Full Bench of Allahabad HC**

1. Can the signs, here waiving of the hand, be regarded as "conduct" within the meaning of Section 8?
2. Shall the signs, waiving of the hand, affirmative and negative, with questions posed be considered as "statement" and hence outside the preview of section 8 and relevant u/s 32, as the victim subsequently died in the facts of this case?

#### **The Learned CJ speaking for the majority stated his view as under**

He opined that, the conduct must be relevant first and then any statement influencing that conduct becomes relevant. In this case, the signs of the hand were a conduct which indicated nothing and were therefore irrelevant and any statement influencing an irrelevant conduct would also be irrelevant. To reproduce the language of the verdict, *"The only conduct which is alleged on the part of the deceased is, that she moved her hand in answer to questions put to her by some of the persons at the hospital. If we went no further than this, there would be nothing to show that her conduct in lifting her hand either influenced or was influenced by the fact in issue,—i.e., the cutting of her throat. Then Explanation 2 is brought in; but it is obvious that before you can let in the words of a third person, you must show that the conduct which they are alleged to affect is*



relevant. **And in the present case it is clear that until you let in the words, the conduct is not relevant**, and therefore the words cannot be let in because the condition precedent to their admissibility has not been satisfied, and that not having been done, their whole basis fails.

Explanation 1 of Section 8 points to a case in which a person whose conduct is in dispute mixes up together actions and statements; and in such a case those **actions and statements** may be proved as a whole. For instance, a person is seen running down a street in a wounded condition, and calling out the name of his assailant, and the circumstances under which the injuries were inflicted. Here what the injured person says and what he does may be taken together and proved as a whole. But the case would be very different if some passer-by stopped him and suggested some name, or asked some question regarding the transaction. **If a person were found making such statements without any question first being asked, then his statements might be regarded as a part of his conduct.** But where the statement is made merely in response to some question or suggestion, it shows a state of things introduced, not by the fact in issue, but by the interposition of something else. For these reasons I think that the signs made by the deceased cannot be admitted by way of "conduct" u/s 8 of the Act.

The reasoning is succinctly put by the judge as to why he did not consider the waiving of the hands by the victim at this stage as a conduct. Then the Court proceeded to analyze the law from the vintage of section 32 of the Act. The judge tried to make out a case for the admission of that waiving of the hand as a language of statement u/s 32. He stated "it is clear that section 32 was intended by the framers of the Act to provide for cases of "dying declarations;" that is to say, where a person mortally injured makes certain **statements regarding the cause and other circumstances of the injury**, and then dies. The question then arises—Is the statement a "verbal" one? "Verbal" means by words. It is not necessary that the words should be spoken. If the term used in the section were "oral," it might be that the statement must be confined to words spoken by the mouth. **But the meaning of "verbal" is something wider.** From the earliest times it has been held that the words of another person may be so adopted by a witness as to be properly treated as the words of the witness himself. The same objection which is now made to the admission in evidence of these signs might equally be made to the assent given by a witness in an action to leading questions put by counsel. If, for example, counsel were to ask—"Is this place a thousand miles from Calcutta?" and the witness replied "Yes," it might be said that the witness made no statement as to the distance referred to. The objection to



leading questions is not that they are absolutely illegal, but only that they are unfair. The only question here is, whether the deceased, by the signs of assent which she made, adopted the verbal statements employed by the questions? I think it must be held that she did so. .... since the deceased might undoubtedly have adopted the words of the Deputy Magistrate by express words, such as "Yes," though even in that case the words in which the statement was actually made would not have been her own, I think she might equally adopt them by signs also. On these grounds, I would answer the reference in the amended form, which I indicated at the outset, in the affirmative.

That waiving of the hand shall be evidence u/s 32 of Act, as it provides any statement verbal or documentary made by person as to the cause of the death is relevant. The signs of the hand looked at through the medium of questions posed did explain the cause of death. By affirmative answer she adopted the words of the questions and it becomes her "verbal statement".

By this reasoning, strange or otherwise, the conduct was reduced to verbal statement.

#### **Dissenting opinion of J. Mahamood**

He said he would willingly differ to the questions of those whose mother tongue was English, as a judge, to him verbal statement could not mean more than by means of word or words. Nodding of head or waiving of hand is not a word. The reproduction of his language is worth reading "*I have arrived at the same conclusion as my learned brethren; but I am obliged to say that my reasons for doing so are not precisely the same. I should accept the view expressed by the learned Chief Justice, if we had not to interpret the language of the statute, and if I did not feel unable to extend the meaning of the term "verbal" in Section 32 of the Evidence Act beyond that of "a word." I take it to be a fundamental principle of the interpretation of statutes that their language must be understood in its most ordinary and popular acceptance. ....and to me "verbal" cannot mean more than "by means of a word or words." Nodding the head or waving the hand is not a word. I therefore put aside Clause (1) of Section 32, which can only apply to "statements written or verbal."*

#### **Effect in Evidence on the Ratio of the Judgment**

On plain reading of both the sections the effects does not noticed. Reiterating the principles it is to state that, both the sections make relevancy of the facts. However, the crucial effect of admission of those words u/s 32 instead of section 8 is that, while u/s 8 the facts when become relevant need to go through the process of corroboration and contradiction, while u/s 32, it becomes itself evidence moreover



substantive. That means relevancy of facts need not go through the strict rules of evidence u/s 3 and it becomes substantive, means conviction of an accused can be laid basing solely upon this facts, without corroboration of material particulars from any other source.

### **Conclusion**

To conclude, given all this, the appreciation of relevancy of the conduct is much more important than its relevancy.

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